No. 13305

United States Court of Appeals for the Ninth Circuit.

MEAD GILMAN, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA and ALBERT CHARLES DARNELL,

Appellees.

Transcript of Record

Appeal from the United States District Court, Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

BLEED THROUGH

BLURRED COPY

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

PARKER, STANBURY, REESE & McGEE,
Suite 1217 Foreman Bldg.,
707 S. Hill St.,
Los Angeles 14, Calif.

For Appellee, United States of America:

WALTER S. BINNS,
United States Attorney:

CLYDE C. DOWNING,
REUBEN ROSENSWEIG,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

For Appellee, Albert Charles Darnell:

MORRIS LAVINE,
619-620 Bartlett Bldg.,
Los Angeles 14, Calif.

BLEED THROUGH

BLURRED COPY

United States District Court, Southern District of California, Central Division

No. 9703-B

ALBERT CHARLES DARNELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA, UNITED STATES COAST & GEODETIC SURVEY, and MEAD GILMAN, JR.,

Defendants.

COMPLAINT FOR PERSONAL INJURIES AND DAMAGES

Comes Now the plaintiff, and complains against the defendants, and for cause of action alleges:

I.

That jurisdiction herein is by virtue of the Federal Tort Claims Act passed August 2, 1946, 60 Stat. 843-847, 28 U.S.C.A., Secs. 921-946.

II.

That plaintiff is a resident of the City of Venice, County of Los Angeles, State of California, being in the jurisdiction of the above-entitled court.

III.

That the defendant United States Coast & Geodetic Survey is an agency of the United States of America.

That the defendant Mead Gilman, Jr., was at the

times mentioned herein an employee of the United States Coast & Geodetic Survey and resides out of the State of California. [2*]

That there is a diversity of citizenship between the plaintiff and the defendant Mead Gilman, Jr., and that the amount involved is more than $3,000.00, exclusive of interest and costs.

IV.

That on or about October 30, 1948, at or about the hour of 10:00 o'clock a.m. of said date, at Blythe, California, plaintiff was driving a certain automobile along the main highway and came to a complete stop behind two automobiles which had stopped to let a parked car emerge.

That at said time and place defendant United States of America and United States Coast and Geodetic Survey were the owners of a certain motor vehicle commonly known as a "jeep," bearing No. U. S. Government 1948—C 5683, which was then and there being driven by the defendant, Mead Gilman, Jr., who was then and there an employee of the United States of America and United States Coast & Geodetic Survey, and acting in the scope of his employment.

V.

That the said defendant, Mead Gilman, Jr., then and there, and while so acting within the scope of his employment as an employee of the other defendants, operated and drove said motor vehicle, said "jeep," in a careless, negligent and reckless

*Page numbering appearing at foot of page of original Certified Transcript of Record.

manner, and that as a direct and proximate cause thereof drove said motor vehicle, said "jeep," into the automobile being driven by plaintiff, and which was at the time of said collision at a complete standstill.

VI.

That said collision was directly and proximately caused by the carelessness, negligence and recklessness of defendants, and as a direct and proximate result thereof plaintiff was thrown and hurled about and then and there became sick, sore, lame, bruised and disordered, and plaintiff was necessarily confined to his bed for a period of approximately five days, and thereafter was hospitalized for approximately twenty-three days, during which time he underwent a surgical [3] operation for a herniated disc, and incurred liability for doctor bills of approximately $1,000 for said surgery, and a further doctor bill of $50.00, and hospital bill of approximately $385.10, X-ray approximately $45.00, and ambulance service approximately $15.00.

That during all of said time plaintiff suffered severe and excruciating pain, nervousness and distress, and plaintiff is informed and believes, and upon such information and belief alleges the fact to be that his said injuries are permanent; that he will continue to suffer same for a long time to come and permanently, and that he will in the future require further medical care and attention.

VII.

That plaintiff is by occupation a carpenter and builder, and that since the said collision and said

injuries plaintiff has been unable, by reason of his said injuries, to gainfully carry on his occupation as a carpenter and builder, and has sustained loss of earning in the sum of approximately $3,000.00.

VIII.

That at the time of said collision and at the time plaintiff sustained said injuries, he was building a home for himself and that by reason of said collision and said injuries he was unable to complete the building of said home promptly and that as a result thereof, such structure was damaged by rain, broken windows and vandalism to the plaintiff's damage in the sum of approximately $700.00.

IX.

Plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that he will be unable to work for a long time to come, and that he will continue to sustain loss of earnings.

X.

That plaintiff has sustained damages for doctor bills and medical care and attention in the sum of One Thousand and Fifty Dollars ($1,050.00); Hospital bill in the sum of Three Hundred Eighty-five and ten/one hundredths Dollars ($385.10); X-ray costs in the sum of Forty-five Dollars [4] ($45.00); Ambulance in the sum of Fifteen Dollars ($15.00); Loss of Earnings in the sum of Three Thousand Dollars ($3,000.00); damage to building in the sum of Seven Hundred Dollars ($700.00), and damage

for injuries, pain and suffering in the sum of Twenty-five Thousand Dollars ($25,000.00).

Wherefore, plaintiff prays for judgment against the defendants as follows:

(1) $25,000.00 for injuries, pain and suffering;

(2) $1,050.00 for medical care and attention;

(3) For hospital care $385.10, X-rays $45.00, and ambulance $15.00.

(4) For such sum for future medical care and attention as to this Court shall seem just and proper;

(5) $3,000.00 for loss of earnings;

(6) For future loss of earnings in such sum as to this Court may seem just and proper;

(7) $700.00 for damage to building;

(8) That the Court, as a part of said judgment, determine a reasonable sum to plaintiff's attorney for attorney's fees; and

(9) For costs of suit herein and for such other and further relief as to this Court shall seem just and proper.

/s/ MORRIS LAVINE,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed May 18, 1949.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, United States of America, for itself alone, and in answer to the complaint on file herein, admits, denies, and alleges as follows:

I.

Defendant has no knowledge or information sufficient to form a belief as to the truth or falsity of the averment contained in Paragraph II of the complaint on file herein, and basing its denial upon said grounds, denies each and every allegation contained therein.

II.

Answering Paragraph III of plaintiff's complaint on file herein, defendant admits that the United States Coast and Geodetic Survey is an agency of the defendant, and that Mead Gilman, Jr., was at the time of the happening of the alleged accident herein an employee of said Coast and Geodetic Survey. This answering defendant has at this time no knowledge or information concerning the residence of said Mead Gilman, Jr. [7]

III.

Answering Paragraph IV of plaintiff's complaint on file herein, defendant admits that on or about October 30, 1948, it was the owner of a certain motor vehicle commonly known as a jeep bearing license No. U. S. Government 1948—C5683, which was being driven by Mead Gilman, Jr., an employee of the

defendant, and at said time and place was acting within the scope of his employment.

IV.

Answering Paragraph V of plaintiff's complaint on file herein, defendant denies, both generally and specifically, that Mead Gilman, Jr., drove and operated the said motor vehicle in a careless, negligent and reckless manner, and that as a result thereof he drove said motor vehicle into the automobile being driven by plaintiff.

V.

Answering Paragraph VI of plaintiff's complaint on file herein, defendant denies, both generally and specifically, that said alleged collision was directly and proximately caused by the carelessness, negligence and recklessness of Mead Gilman, Jr. Defendant having no knowledge or information sufficient to form a belief as to the truth or falsity of the averments relating to the injuries allegedly suffered by plaintiff and the hospitalization and other medical expenses allegedly incurred by plaintiff, and basing its denial upon said grounds, denies each and every allegation contained therein.

VI.

Defendant having no information sufficient to form a belief as to the truth or falsity of the averments contained in Paragraphs VII, VIII, IX and X of plaintiff's complaint on file herein, and basing its denial upon said grounds, denies, both generally and specifically, each and every allegation contained therein.

For a Further, Separate, Second and Distinct Answer and Affirmative Defense This Answering Defendant Alleges as Follows:

I.

That the injuries to plaintiff, if any, and the result or [8] damage to plaintiff, if any, were caused without any fault, carelessness or negligence on the part of this answering defendant or any of its agents, servants and/or employees acting within the scope of their employment, but were the result of an unavoidable accident so far as this defendant is concerned.

For a Further, Separate, Third and Distinct Answer and Affirmative Defense, This Answering Defendant Alleges as Follows:

I.

That the injuries to plaintiff, if any, and the result or damage to plaintiff, if any, were proximately caused by the sole carelessness and negligence on the part of plaintiff, Albert Charles Darnell.

Wherefore, this answering defendant prays judgment as follows:

1. That the plaintiff take nothing by virtue of his action on file herein, and that his complaint be dismissed.

2. That the defendant have its costs of suit incurred herein, and

3. For such other and further relief as the Court may deem just and proper in the premises.

JAMES M. CARTER,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant, United States of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 15, 1949. [9]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

(Or, in the Alternative, Requesting the Court to Dismiss of Its Own Motion)

To the Plaintiff, Albert Charles Darnell, and to His Attorney, Morris Lavine, and to the Defendants, United States of America and United States Coast & Geodetic Survey, and to Their Attorney, the United States Attorney for the Southern District of California:

You, and Each of You, Will Please Take Notice that on Monday, the 4th day of December, 1950, at the hour of 10:00 a.m., or as soon thereafter as the matter can be heard in Courtroom No. 5, located in the United States Post Office and Court House in the City of Los Angeles, State of California, before the Honorable Harry C. Westover, the defendant,

Mead Gilman, Jr., will move the court for an order dismissing the above-entitled action as to the defendant Mead Gilman, Jr.

Said motion will be made upon the following grounds: [11]

(1) That the court lacks jurisdiction over the subject matter.

(2) That there is a failure to state a claim upon which relief can be granted.

(3) That there is a misjoinder of parties defendant.

Said motion will be based upon the fact that plaintiff in this action seeks to join the United States of America as a defendant with an individual, one of its employees, the defendant, Mead Gilman, Jr., and the jurisdiction to hear such cause does not lie with the above-entitled court; on the further basis that there is a misjoinder of parties defendant in this: that an action against the United States cannot be joined with an action against its employees for civil damages under the Federal Tort Claims Act.

Dated this 14th day of November, 1950.

PARKER, STANBURY,
REESE & McGEE,

By /s/ HARRY W. PARKER,
Attorneys for Defendant,
Mead Gilman, Jr.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 16, 1950. [12]

BLEED THROUGH

BLURRED COPY

United States District Court, Southern District of California, Central Division

No. 9703-HW

ALBERT CHARLES DARNELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

ORDER OF DISMISSAL

On Monday, the 4th day of December, 1950, at the hour of 10:00 a.m., upon the representation of Reuben Rosensweig, Esq., Assistant United States Attorney of the Southern District of California, that the United States Coast & Geodetic Survey, a defendant herein, was an agency of the United States of America, a defendant herein and an unnecessary party defendant, and upon the further representation that no opposition would be offered by Morris Lavine, attorney for plaintiff herein, it is now, upon the court's own motion,

Ordered, Adjudged and Decreed that the above-entitled action be dismissed as to the defendant United States Coast & Geodetic Survey.

Dated December 8th, 1950.

/s/ HARRY C. WESTOVER,
Judge. [16]

Approved as to form:

/s/ MORRIS LAVINE,
Attorney for Plaintiff,
Albert Charles Darnell.

Approved as to form:

/s/ REUBEN ROSENSWEIG,
Attorney for Defendants, United States of America and United States Coast & Geodetic Survey.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 8, 1950.

Entered December 13, 1950. [17]

United States District Court, Southern District of California, Central Division

No. 9703-HW

ALBERT CHARLES DARNELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

ORDER OF DISMISSAL

The motion on behalf of the defendant Mead Gilman, Jr. came on regularly to be heard before the Honorable Harry C. Westover, Judge of the above-entitled court, Court Room number 5 thereof, lo-

cated in the United States Post Office and Court House Building, City of Los Angeles on the 4th day of December, 1950. Moving party, Mead Gilman, Jr., a defendant herein was represented by his counsel, Parker, Stanbury, Reese & McGee, John Henry Peckham, Esquire of counsel. Defendant United States of America and United States Coast & Geodetic Survey were represented by their counsel Ernest A. Tolin, United States Attorney, Reuben Rosensweig, Esquire of counsel. Plaintiff was not present and his counsel, Morris Lavine, Esquire, was absent, but announced his acquiescence through counsel for the United States of America Mr. Reuben Rosensweig, in the hearing of the matter at the said time and place and motion vacated, Mr. Rosensweig having announced in open court that upon instructions from the office of the Attorney General of the United States that the United States of America would not oppose the motion and that plaintiff's counsel, Morris Lavine, would not oppose the motion and the court having considered the motion and the law involved and the court being fully advised in the premises

It Is Now Ordered, Adjudged and Decreed that the motion of Mead Gilman, Jr. for dismissals of the above-entitled action as to the said defendant Mead Gilman Jr. be and it is hereby granted.

Dated December 8th, 1950.

/s/ HARRY C. WESTOVER,
Judge of the United States District Court, Southern District of California, Central Division.

Approved as to form.

/s/ MORRIS LAVINE,
Attorney for plaintiff,
Albert Charles Darnell.

Approved as to form.

/s/ REUBEN ROSENSWEIG,
Attorney for defendants United States of America and United States Coast & Geodetic Survey.

Affidavit of Service by mail attached.

[Endorsed]: Filed December 8, 1950.

Entered December 12, 1950.

[Title of District Court and Cause.]

NOTICE OF MOTION TO BRING IN THIRD PARTY

To the Above-Named Plaintiff, Albert Charles Darnell, and to Morris Lavine, His Attorney:

You, and Each of You, Will Please Take Notice that on the 2nd day of January, 1951, at the hour of 10:00 a.m. or as soon thereafter as counsel can be heard, the defendant, United States of America, will move the above-entitled Court at the Post Office and Court House Building, Los Angeles, California, for leave, as a Third-Party Plaintiff, to serve a summons and complaint upon Mead Gilman, Jr., who is not a party to the action, but who is or may be liable to the defendant, United States of

America, for all or part of plaintiff's claim against the defendant, United States of America. Said motion will be based upon the grounds more fully set forth in defendant's Motion to [22] bring in Third Party.

This motion will be based upon all of the documents, papers and records of the within action and under Rule 14 (a) of the Federal Rules of Civil Procedure.

Dated December 18, 1950.

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff.

[Endorsed]: Filed December 18, 1950. [23]

[Title of District Court and Cause.]

MOTION TO BRING IN THIRD PARTY

Comes Now the defendant, United States of America, by and through its counsel, Ernest A. Tolin, United States Attorney for the Southern District of California, and Clyde C. Downing and Reuben Rosensweig, Assistants United States Attor-

ney for the Southern District of California, and moves the above-entitled Court for leave to make Mead Gilman, Jr., a party to this action, and that should said motion be granted, there be served upon said Mead Gilman, Jr., a copy of each of the following documents:

1. Complaint for personal injuries and damages;
2. Third-Party Summons;
3. Third-Party Complaint;

copies of which documents are also attached hereto and marked, respectively, Exhibits "A," "B" and "C." [24]

* * *

Dated this 18th day of December, 1950.

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff.

[Endorsed]: Filed December 18, 1950. [26]

At a stated term, to wit: the September term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday, the 2nd day of January, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Harry C. Westover,
District Judge.

[Title of Cause.]

ORDER GRANTING MOTION TO BRING IN THIRD PARTY

For hearing motion of defendant, U.S.A., filed Dec. 18, 1950, to bring in Mead Gilman, Jr., as third-party defendant; Reuben Rosensweig, Asst. U.S. Atty., appearing as counsel for movant, states there is no opposition to said motion, and the Court orders said motion granted. [27]

In the United States District Court in and for the Southern District of California, Central Division

No. 9703-HW

ALBERT CHARLES DARNELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant and Third-Party Plaintiff,

vs.

MEAD GILMAN, JR.,

Third-Party Defendant.

THIRD-PARTY COMPLAINT

Comes Now the defendant and Third-Party plaintiff, United States of America, and alleges as follows:

I.

The plaintiff, Albert Charles Darnell, has filed against the defendant, United States of America, a complaint for damages for personal injuries under the Federal Tort Claims Act, a copy of which complaint is hereto attached and marked Exhibit "A."

II.

That at the time of the happening of the accident in which plaintiff, Albert Charles Darnell, was injured, the third-party defendant, Mead Gilman, Jr., was an agent, servant and employee of the de-

fendant, United States of America, and was at said time acting within the scope and duty of his employment as an [28] employee of the Coast and Geodetic Survey of the Department of Commerce of the United States.

III.

That as a direct and proximate result of the alleged negligence of said Third-party defendant, defendant, United States of America, may become liable to plaintiff, Albert Charles Darnell, for damages for the alleged injuries sustained by plaintiff.

IV.

That if and in the event, plaintiff, Albert Charles Darnell, recovers damages from the defendant, United States of America, as a result of the alleged negligence of said Third-party defendant, then the United States of America is entitled to recover from said Third-party defendant all of those sums which defendant, United States of America, may be compelled to pay plaintiff, Albert Charles Darnell.

Wherefore, defendant, United States of America, demands judgment against the Third-party defendant, Mead Gilman, Jr., for all sums that may be adjudged against the defendant, United States of America, in favor of plaintiff, Albert Charles Darnell, for its costs of action incurred herein, and for such other and further relief as the Court may deem just and proper in the premises.

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff.

[Endorsed]: Filed January 2, 1951. [29]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS
(Or, in the Alternative, Requesting the Court to Dismiss of Its Own Motion)

To the Defendant and Third-Party Plaintiff, the United States of America, and to Its Attorney, United States Attorney for the Southern District of California:

You, and Each of You, Will Please Take Notice that on the 26th day of March, 1951, at the hour of 10 a.m., or as soon thereafter as the matter can be heard, in Courtroom No. 5 of the above-entitled Court, located in the United States Post Office and Court House in the City of Los Angeles, State of California, before the Hon. Harry C. Westover, the Third-party defendant, Mead Gilman, Jr., will move the Court for an order dismissing the above-entitled action as to the Third-party defendant, Mead Gilman, Jr. [34]

Said motion will be made upon the following grounds:

1. That the Court lacks jurisdiction over the subject matter.

2. That there is a failure to state a claim upon which relief can be granted.

Said motion will be based upon the fact that plaintiff in this action sues the United States of America as a defendant and that defendant seeks to join as a third-party defendant one of its employees, defendant Mead Gilman, Jr., and the jurisdiction to hear such cause does not lie with the above-entitled Court; on the further ground that no action lies under the Federal Tort Claims Act against an employee of the Government in the circumstances herein involved; on the further ground that under the Federal Tort Claims Act the Government assumes liability for its employees; and on the further ground that to join the third-party defendant, Mead Gilman, Jr., herein would deprive him of the right to trial by jury.

Dated this 5th day of March, 1951.

PARKER, STANBURY,
REESE & McGEE,

By /s/ J. H. PECKHAM,
Attorneys for Defendant,
Mead Gilman, Jr.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 5, 1951. [35]

[Title of District Court and Cause.]

ANSWER OF MEAD GILMAN, JR., TO THIRD-PARTY COMPLAINT

Comes Now the third-party defendant, Mead Gilman, Jr., and in answer to the third-party complaint on file herein admits, denies and alleges as follows:

I.

Denies generally and specifically each and every allegation contained in Paragraphs III and IV of said third-party complaint.

Wherefore, this third-party defendant prays that defendant and third-party plaintiff take nothing herein and that this third-party defendant be awarded judgment for his costs of suit herein incurred.

PARKER, STANBURY,
REESE & McGEE,

By /s/ HARRY W. PARKER,
Attorneys for Third-Party Defendant, Mead Gilman, Jr.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 4, 1951. [39]

[Title of District Court and Cause.]

ORDER DENYING THIRD-PARTY DEFENDANT'S MOTION TO DISMISS

The Motion on behalf of Third-party defendant, Mead Gilman, Jr., came on regularly for hearing on March 26, 1951, in the above-entitled Court, on Third-party defendant's Motion to Dismiss, before the Honorable Harry C. Westover, the Third-party defendant being represented by Parker, Stanbury, Reese & McGee, by John Henry Peckham, Esq., of counsel; the defendant and Third-party plaintiff, United States of America, being represented by its counsel, Ernest A. Tolin, United States Attorney for the Southern District of California, and Clyde C. Downing and Reuben Rosensweig, Assistants United States Attorney for the Southern District of California, of counsel, and the Court having heard oral arguments of counsel, and having had submitted to it Points and Authorities by each counsel, and being fully satisfied in the premises,

It Is Hereby Ordered, Adjudged and Decreed that Third-party [41] defendant's Motion to Dismiss is hereby denied.

Dated April 11th, 1951.

/s/ HARRY C. WESTOVER,
Judge, United States District Court.

Approved as to form:

/s/ MORIS LAVINE,
Attorney for Plaintiff.

PARKER, STANBURY,
REESE & McGEE,

By /s/ J. H. PECKHAM,
Attorneys for Third-Party
Defendant.

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assist U. S. Attorney,
Chief of Civil Division;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff.

[Endorsed]: Filed April 12, 1951. [42]

[Title of District Court and Cause.]

OPINION

Plaintiff Albert Charles Darnell filed this action against United States of America, United States Coast & Geodetic Survey, and Mead Gilman, Jr., under the Federal Tort Claims Act.

Upon representation of the United States Attorney for the Southern District of California that

United States Coast & Geodetic Survey, one of the named defendants, is an agency of the United States of America, the action against United States Coast & Geodetic Survey was dismissed.

Mead Gilman, Jr., also moved that the complaint be [43] dismissed as to him, which motion was granted. Defendant United States of America then filed a motion to make Mead Gilman, Jr., a third-party defendant. The motion was opposed by Mead Gilman, Jr., but after consideration by the Court, was granted, and Mead Gilman, Jr., was then made third-party defendant. Subsequently he appeared and moved the Court to dismiss the action against him as third-party defendant. The motion was denied, and Mead Gilman, Jr., as third-party defendant, filed his answer to the Third-Party Complaint.

The matter came on regularly for trial, United States of America appearing as defendant and as third-party plaintiff, and Mead Gilman, Jr., appearing as third-party defendant. After a hearing before the Court, judgment was rendered in favor of plaintiff, Albert Charles Darnell, and against defendant, United States of America, in the sum of $5,500.00. The cause of action of the United States of America as third-party plaintiff against Mead Gilman, Jr., third-party defendant, was submitted to the Court for decision.

Evidence in this case disclosed that Mead Gilman, Jr., was a civilian employee of United States Coast & Geodetic Survey, and that in the course of his employment he drove and operated a "jeep" (owned by the United States Coast & Geodetic Survey) in

such a careless, negligent and reckless manner that it collided with and damaged an automobile driven and operated by plaintiff, Albert Charles Darnell, inflicting personal injuries upon said plaintiff.

The question now before the Court is the right of the Government to maintain an action against a negligent employee who causes injury to a third party. [44]

The rule in California is stated as follows:

"An employer against whom a judgment has been rendered for damages occasioned by the unauthorized negligent act of an employee may recoup his losses in an action against the negligent employee."

Meyers v. Tranquility Irrigation District,
26 Cal. App. (2d) 385;

Johnston v. City of San Fernando,
35 Cal. App. (2d) 244.

The fact that the employer in the case at bar is the United States Government and the employee a civilian employee does not in any way affect the general rule. There seems to be no doubt in California that where a servant is solely responsible for injury because of an unauthorized negligent act the employer, who is forced to respond in damages because of the negligence of the servant, may maintain an action against the servant for the amount of damages sustained. The government in this case had the right to make the servant a third-party defendant, so that the matter in controversy could be determined in one action rather than in two.

The Supreme Court in its latest decision, United

States of America v. Yellow Cab Co. and Capitol Transit Co. v. U.S.A., 218 and 204, October Term, 1940, says, in speaking of actions under the Tort Claims Act:

> "Of course there is no immunity from suit by the government to collect claims for contribution due it from its joint tort feasors. The government should be able to enforce this right in a Federal court not only in a separate [45] action but by impleading the joint tort feasor as a third-party defendant."

Under the facts of this case and the law as established both by the State and Federal courts, judgment must be rendered in favor of third-party plaintiff, United States of America, and against the third-party defendant, Mead Gilman, Jr. The government is entitled to a judgment against Mead Gilman, Jr., in the sum of five thousand five hundred ($5,500.00) dollars.

It is so ordered.

Dated November 14, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed November 14, 1951. [46]

[Title of District Court and Cause.]

OBJECTIONS TO CONCLUSIONS OF LAW AND JUDGMENT

Comes Now the third-party defendant, Mead Gilman, Jr., by his attorneys, Parker, Stanbury, Reese & McGee, by Wm. C. Wetherbee of counsel, and objects to the Conclusions of Law served and filed by counsel for the plaintiff and to the Judgment prepared therein on the following grounds:

I.

Although third-party defendant, Mead Gilman, Jr., could become liable to the third-party plaintiff, United States of America, only upon a conclusion of law that said United States of America was entitled to recover from its employee for damage resulting to it from the negligent act of its employee under the Federal Tort Claims Act, [47] no such conclusion of law is contained within the Conclusions of Law served and filed upon this third-party defendant.

II.

The Judgment is erroneous in form and substance in that it is not in accordance with the issues submitted by the pleadings or the Court's Opinion filed in the above-entitled matter.

The Judgment in its present form purports to grant plaintiff a judgment against the defendant United States of America and the third-party defendant, Mead Gilman, Jr. It should clearly show that judgment in favor of said plaintiff was granted

against the defendant United States of America in the sum of $5,500.00 and should show judgment in favor of the third-party plaintiff, United States of America, against the third-party defendant, Mead Gilman, Jr., in the sum of $5,500.00.

In addition no provision or opportunity was given to third-party defendant and his attorneys to approve or disapprove the Judgment as to form as required by Rule 7 of the Local Rules of this District Court.

Wherefore, it is submitted that said Judgment erroneously is a joint judgment against the United States of America, defendant, and Mead Gilman, Jr., third-party defendant, which is improper and confuses the record for purposes of appeal.

PARKER, STANBURY,
REESE & McGEE,

By /s/ WM. C. WETHERBEE,
Attorneys for Third-Party
Defendant, Mead Gilman, Jr.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 27, 1951. [48]

[Title of District Court and Cause.]

OBJECTIONS TO CONCLUSIONS OF LAW AND JUDGMENT

Comes Now the defendant and third-party plaintiff, United States of America, by and through its

counsel of record, and objects to the Conclusions of Law served and filed by counsel for plaintiff, Albert Charles Darnell, and to the Judgment prepared therein on the following grounds:

I.

Although third-party defendant, Mead Gilman, Jr., could become liable to the defendant and third-party plaintiff, United States of America, only upon a conclusion of law that said United States of America was entitled to recover from its employee for damages resulting to it from the negligent act of its employee under the Federal Tort Claims Act, no such conclusion of law is contained within the Conclusions of Law served and filed upon this defendant and third-party plaintiff.

II.

The defendant and third-party plaintiff, United States of America, submits that the Judgment is erroneous in that it is not in accord [50] with the issues submitted by the pleadings of the Court's Opinion heretofore filed in this case.

The Judgment in its present form purports to grant plaintiff, Albert Charles Darnell, a judgment against the defendant and third-party plaintiff, United States of America, and the third-party defendant, Mead Gilman, Jr. The defendant and third-party plaintiff, United States of America, believes that the Judgment should clearly show that judgment in favor of said plaintiff was granted against the defendant and third-party plaintiff,

United States of America, in the sum of $5,500, and should further show that judgment in favor of the defendant and third-party plaintiff, United States of America, against the third-party defendant, Mead Gilman, Jr., in the sum of $5,500.00.

Wherefore, it is submitted that said Judgment erroneously is a joint judgment against the United States of America and Mead Gilman, Jr., which we believe is improper.

Dated November 29, 1951.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ REUBEN ROSENSWIEG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 30, 1951. [51]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for hearing on October 9, 1951, before the Honorable Harry C. Westover, Judge of the U. S. District Court in and for the Southern District of California, Central Division, the plaintiff, Albert Charles Darnell, appearing by his attorney, Morris Lavine; the defendant and third-party plaintiff, United States of America, appearing by Ernest A. Tolin, United States Attorney, and Clyde C. Downing and Reuben Rosensweig, Assistants U. S. Attorney, and third-party defendant, Mead Gilman, Jr., appearing by William C. Wetherbee of Parker, Stanbury, Reese & McGee, and plaintiff having produced evidence, and the plaintiff, Albert Charles Darnell, and the defendant and third-party plaintiff, United States of America, having stipulated to certain facts, and an exhibit having been introduced, and the Court having heard testimony, both oral and documentary, and certain stipulations of fact having been [53] entered into, the Court finds as follows:

I.

That on October 30, 1948, at about the hour of 10 a.m., plaintiff, Albert Charles Darnell, was driving an automobile in the township of Blythe, State of California.

II.

That the plaintiff stopped his car and was at a complete stop when he was struck in the rear by a

vehicle belonging to defendant, United States of America, and operated by Mead Gilman, Jr., an employee of the defendant, United States of America, and operated by Mead Gilman, Jr., an employee of the defendant, United States of America, within the scope and duty of his employment for the defendant, United States of America.

III.

That third-party defendant, Mead Gilman, Jr., drove said vehicle carelessly, recklessly and negligently, and that as a direct and proximate result of said negligence, recklessness and carelessness, plaintiff Albert Charles Darnell suffered physical injuries therefrom.

IV.

That said physical injuries suffered by plaintiff, Albert Charles Darnell, were of such a character as to require an operation upon his person and to require hospitalization and surgical and medical care and attention, and that as a direct and proximate result of said negligence of third-party defendant, Mead Gilman, Jr., plaintiff was generally and specially damaged in the sum of $5,500.

V.

That at the time of the happening of the accident in which plaintiff Albert Charles Darnell was injured, third-party defendant, Mead Gilman, Jr., was an agent, servant and employee of defendant and third-party plaintiff, United States of America, and was at said time and place acting within the scope and duty of his employment as an employee of the

Coast and Geodetic Survey of the Department of Commerce of the United States. [54]

VI.

That as a direct and proximate result of the negligence, recklessness and carelessness of said third-party defendant, Mead Gilman, Jr., the United States of America, became liable to plaintiff, Albert Charles Darnell, for damages in the sum of $5,500 for injuries suffered by plaintiff, Albert Charles Darnell.

VII.

That as a direct and proximate result of the negligence, recklessness and carelessness of said third-party defendant, Mead Gilman, Jr., the defendant and third-party plaintiff, United States of America, is entitled to recover from said Mead Gilman, Jr., the sum of $5,500, which defendant and third-party plaintiff, United States of America, will be compelled to pay to plaintiff, Albert Charles Darnell, for the injuries which he suffered.

Conclusions of Law

From the foregoing facts, the Court makes the following conclusions of law:

I.

That the plaintiff, Albert Charles Darnell, is entitled to judgment against the defendant and third-party plaintiff, United States of America, in the sum of $5,500.

II.

That defendant and third-party plaintiff, United

States of America, having had judgment rendered against it in the sum of $5,500 as a direct and proximate result of the negligence, carelessness and recklessness of its employee, third-party defendant, Mead Gilman, Jr., the defendant and third-party plaintiff, United States of America, is entitled to judgment against the said third-party defendant, Mead Gilman, Jr., in the sum of $5,500.00.

Dated Jan. 15, 1952.

/s/ HARRY C. WESTOVER,
Judge of the United States
District Court.

Approved as to form:

/s/ REUBEN ROSENSWEIG,

/s/ MORRIS LAVINE,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 15, 1952. [55]

In the United States District Court in and for the Southern District of California, Central Division

No. 9703-HW

ALBERT CHARLES DARNELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant and Third-Party Plaintiff.

JUDGMENT

This cause having come on regularly for trial before the Hon. Harry C. Westover, Judge of the U. S. District Court in and for the Southern District of California, Central Division, and the plaintiff having appeared in person by his counsel, Morris Lavine, and defendant and third-party plaintiff, United States of America, having appeared by Ernest A. Tolin, United States Attorney, and Clyde C. Downing and Reuben Rosensweig, Assistants U. S. Attorney, and third-party defendant, Mead Gilman, Jr., having appeared in person with his counsel, William C. Wetherbee of the firm of Parker, Stanbury, Reese & McGee, and the Court having taken testimony, both oral and documentary, and certain Stipulations of Fact having been entered into, and the Court having heard all of the arguments of counsel,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff, Albert Charles Darnell, be and is

awarded the sum of $5,500 against defendant and third-party plaintiff, United States of America.

Dated January 15th, 1952.

/s/ HARRY C. WESTOVER,
Judge of the United States
District Court.

Approved as to form:

/s/ REUBEN ROSENSWEIG.

/s/ MORRIS LAVINE,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 15, 1952.

Entered and Docketed January 15, 1952. [57]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for hearing on October 9, 1951, before the Honorable Harry C. Westover, Judge of the U. S. District Court in and for the Southern District of California, Central Division, the plaintiff, Albert Charles Darnell, appearing by his attorney, Morris Lavine; the defendant and third-party plaintiff, United States of America, appearing by Ernest A. Tolin, United States Attorney, and Clyde C. Downing and Reuben

Rosensweig, Assistants U. S. Attorney, and the third-party defendant, Mead Gilman, Jr., appearing by William C. Wetherbee of Parker, Stanbury, Reese & McGee, and plaintiff having produced evidence, and the plaintiff, Albert Charles Darnell, and the defendant, United States of America, having stipulated to certain facts, and an exhibit having been introduced, and the Court having heard testimony, both oral and documentary, and certain Stipulations of Fact having been entered into, [59] the Court finds as follows:

I.

That on October 30, 1948, at about the hour of 10:00 a.m., the plaintiff, Albert Charles Darnell, was driving an automobile in the township of Blythe, State of California.

II.

That the plaintiff stopped his car and was at a complete stop when he was struck in the rear by a vehicle belonging to the defendant, United States of America, and operated by Mead Gilman, Jr., an employee of the defendant, United States of America, within the scope and duty of his employment, for the defendant, United States of America.

III.

That third-party defendant, Mead Gilman, Jr., drove said vehicle carelessly, recklessly and negligently, and that as a direct and proximate result of said negligence, recklessness and carelessness,

plaintiff, Albert Charles Darnell, suffered physical injuries therefrom.

IV.

That said physical injuries suffered by plaintiff, Albert Charles Darnell, were of such a character as to require an operation upon his person and to require hospitalization and surgical and medical care and attention, and that as a direct and proximate result of said negligence of third-party defendant, Mead Gilman, Jr., plaintiff was generally and specially damaged in the sum of $5,500.00

V.

That at the time of the happening of the accident in which plaintiff, Albert Charles Darnell, was injured, third-party defendant, Mead Gilman, Jr., was an agent, servant and employee of defendant and third-party plaintiff, United States of America, and was at said time and place acting within the scope and duty of his employment as an employee of the Coast and Geodetic Survey of the Department of Commerce of the United States.

VI.

That as a direct and proximate result of the negligence, [60] recklessness and carelessness of said third-party defendant, Mead Gilman, Jr., defendant and third-party plaintiff, United States of America, became liable to plaintiff, Albert Charles Darnell, for damages in the sum of $5,500, for the injuries suffered by plaintiff, Albert Charles Darnell.

VII.

That as a direct and proximate result of the

negligence, recklessness, and carelessness of said third-party defendant, Mead Gilman, Jr., the defendant and third-party plaintiff, United States of America, is entitled to recover from said Mead Gilman, Jr., the sum of $5,500, which defendant and third-party plaintiff, United States of America, will be compelled to pay to plaintiff, Albert Charles Darnell, for the injuries which he suffered.

Conclusions of Law

From the foregoing facts, the Court makes the following Conclusions of Law:

I.

That defendant and third-party plaintiff, United States of America, having had judgment rendered against it in the sum of $5,500 as a direct and proximate result of the negligence, carelessness and recklessness of third-party defendant, Mead Gilman, Jr., the defendant and third-party plaintiff, United States of America, is entitled to judgment against the said Mead Gilman, Jr., in the sum of $5,500.

Dated Jan. 15, 1952.

/s/ HARRY C. WESTOVER,
Judge of the United States
District Court.

Approved as to form:

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff. [61]

Receipt of Copy acknowledged.

Lodged November 30, 1951.

[Endorsed]: Filed January 15, 1952. [62]

In the United States District Court in and for the Southern District of California, Central Division

No. 9703-HW

ALBERT CHARLES DARNELL,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant and Third-Party Plaintiff,

vs.

MEAD GILMAN, JR.,
Third-Party Defendant.

JUDGMENT

This cause having come on regularly for trial before the Honorable Harry C. Westover, Judge of the United States District Court, in and for the

Southern District of California, Central Division, and the plaintiff having appeared in person and by his counsel, Morris Lavine, and defendant and third-party plaintiff, United States of America, having appeared by Ernest A. Tolin, United States Attorney; Clyde C. Downing and Reuben Rosenseiwg, Assistants U. S. Attorney, and the third party defendant, Mead Gilman, Jr., having appeared in person and with his counsel, William C. Wetherbee of the firm of Parker, Stanbury, Reese & McGee, and the Court having taken testimony, both oral and documentary, and certain Stipulations of Fact having been entered into, and the Court having heard all the arguments of counsel,

It Is Hereby Ordered, Adjudged and Decreed that defendant and [64] third-party plaintiff, United States of America, be and is awarded the sum of $5,500.00 against third-party defendant, Mead Gilman, Jr.

Dated Jan. 15th, 1952.

/s/ HARRY C. WESTOVER,
Judge of the United States
District Court.

Approved as to form:

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff.

Receipt of Copy acknowledged.

Lodged November 30, 1951.

[Endorsed]: Filed January 15, 1952.

Entered and Docketed January 15, 1952. [65]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 73 (b)

Notice Is Hereby Given that third-party defendant, Mead Gilman, Jr., above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order denying his motion for dismissal as third-party defendant and from the final judgment entered in this action on January 15, 1952, in favor of defendant and third-party plaintiff, United States of America.

PARKER, STANBURY,
REESE & McGEE,

By /s/ WM. C. WETHERBEE,
Attorneys for Appellant, Mead Gilman, Jr., Third-Party Defendant.

[Endorsed]: Filed February 15, 1952. [67]

[Title of District Court and Cause.]

WAIVER OF FILING OF BOND AND ORDER

Comes Now the defendant and third-party plaintiff in the above-entitled matter, United States of America, and waives the filing of any bond by third-party defendant, Mead Gilman, Jr., as a condition to his appeal, and stipulates that without the necessity of a supersedeas bond stay of execution on the judgment entered may be ordered until such time as the appeal is determined.

Dated February 20, 1952.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division; [71]

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff.

PARKER, STANBURY,
REESE & McGEE,

By /s/ WM. C. WETHERBEE,
Attorneys for Third-Party
Defendant.

It is so Ordered this 3rd day of March, 1952.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed March 3, 1952. [72]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 72, inclusive, contain the original Complaint for Personal Injuries and Damages; Answer; Notice of Motion to Dismiss, etc.; Order of Dismissal as to United States Coast & Geodetic Survey; Order of Dismissal as to Mead Gilman, Jr.; Notice of Motion to Bring in Third Party; Motion to Bring in Third Party; Third Party Complaint; Notice of Motion to Dismiss; Answer of Mead Gilman, Jr., to Third Party Complaint; Order Denying Third-Party Defendant's Motion to Dismiss; Opinion; Objections to Conclusions of Law and Judgment of Mead Gilman, Jr.; Objections to Conclusions of Law and Judgment of United States of America; Findings of Fact and Conclusions of Law and Judgment Favor of Plaintiff; Findings of Fact and Conclusions of Law and Judgment Favor of Third-Party Plaintiff; Notice of Appeal; Designation of Record on Appeal and Waiver of Bond, etc., and a full, true and correct copy of minute order entered January 2, 1951, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 18th day of March, A.D. 1952.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13,305. United States Court of Appeals for the Ninth Circuit. Mead Gilman, Jr., Appellant, vs. United States of America and Albert Charles Darnell, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 19, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals,
Ninth Circuit

No. 13305

ALBERT CHARLES DARNELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant and Third-party Plaintiff,

vs.

MEAD GILMAN, JR.,

Third-party Defendant.

DESIGNATION OF CONTENTS OF RECORD AND STATEMENT OF POINTS ON APPEAL

To the Clerk of the Above-Entitled Court, to the Defendant and Third-Party Plaintiff, United States of America, and to Its Attorneys:

You, and Each of You, Will Please Take Notice that the third-party defendant, Mead Gilman, Jr., hereby makes his designation of the portions of the record, proceedings and evidence to be contained in the record on appeal:

1. All of the pleadings.
2. All of the motions and notices of motions to dismiss and the orders made thereon.
3. All of the findings of fact and conclusions of law, together with the direction for the entry of judgment thereon.

4. The opinions of the Court.
5. The judgments.
6. The notice of appeal, together with date of filing.
7. The judgment roll.
8. Clerk's certificate.

No evidentiary material need be included in the record since appellant relies upon the following points on appeal:

1. Failure to state a claim upon which relief can be granted.

2. Lack of jurisdiction over the subject matter.

PARKER, STANBURY,
REESE & McGEE,

By /s/ WM. C. WETHERBEE,
Attorneys for Third-Party Defendant, Mead Gilman, Jr.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 24, 1952.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11305

MEAD GILMAN, JR., APPELLANT

vs.

UNITED STATES OF AMERICA AND ALBERT CHARLES DARNELL, APPELLEES

Appeal from the United States District Court for the Southern District of California, Central Division

PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, May 8, 1953

Before: POPE, *Circuit Judge,* MCCORMICK and HARRISON, *District Judges*

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Wm. C. Waterbee, counsel for appellant and Mr. T. S. L. Perlman, Attorney, Department of Justice, counsel for appellee, United States of America, and submitted to the court for consideration and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, August 1, 1953

Before: POPE, *Circuit Judge,* MCCORMICK and HARRISON, *District Judges*

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion and dissenting opinion of Harrison, D. J., this day rendered by this Court in the above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13,305

August 3, 1953

MEAD GILMAN, JR., APPELLANT

vs.

UNITED STATES OF AMERICA AND ALBERT CHARLES DARNELL, APPELLEES

Appeal from the United States District Court, Southern District of California, Central Division

Before POPE, *Circuit Judge*, and MCCORMICK and HARRISON, *District Judges*

POPE, *Circuit Judge:*

The question presented by this appeal is whether the United States, after suffering judgment against it under the Federal Tort Claims Act (28 USCA 1346(b)) for injuries arising from the negligent operation of a government automobile, may recover, by way of indemnity, the amount of such judgment from its employee, the driver who was guilty of the negligence which caused the injuries.

Appellee Darnell brought the original action against the United States to recover damages for injuries arising when his automobile collided with a government car driven by the appellant who was an employee of the United States Coast and Geodetic Survey. The court granted the Government's motion under Rule 14(a) of the Rules of Civil Procedure for leave to implead the appellant as a third party defendant, and thereupon a third party complaint was filed asking that if the United States should be held liable it should have indemnity against appellant for the full amount of its liability. Appellant's motion to dismiss the third party complaint was denied and upon trial the district court found that the plaintiff's injuries were caused solely by the negligence of the appellant acting within the scope of his employment. Accordingly, the court gave judgment against the United States for $5500. Upon the same day it gave judgment against the appellant and in favor of the United States in the same amount of $5500. From the latter judgment this appeal is taken.

Although the judgment in favor of the Government and against the appellant was entered in an action brought under the Tort Claims Act, the cause of action which the Government asserted was not based upon any provision of that Act. It was asserted under

the common law rule that under circumstances similar to those here present, a private employer may recover from his negligent employee the amount the employer has been required to pay under a judgment in favor of a third person arising from damage caused by the employee's negligent act, where judgment ran against the employer solely by reason of the doctrine of *respondeat superior*. The trial court pointed out that this rule is well established in California where the accident occurred, citing *Myers* v. *Tranquility Irrigation District*, 26 C.A. 2d 385, 79 P. 2d 419, and *Johnston* v. *City of San Fernando*, 35 C.A. 2d 244, 95 P. 2d 147, and held that the Government should have the same right under the same rule.

The rule is one generally recognized and enforced by both state and federal courts. See Prosser on Torts, p. 1114, Restatement of the Law of Agency, §401, comment c; *Washington Gas Co.* v. *District of Columbia*, 161 U.S. 316. The appellant contends, however, that §2676 of Title 28, which was enacted as a part of the Federal Tort Claims Act, discloses that it was the intention of Congress to give the Government employee certain benefits under the Act, and that the intention so expressed in this section is inconsistent with any possible holding that the employee might be made liable for indemnity to the United States. That section provides: "The judgment in an action under Section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

The Government in reply to this contention points out that the language of the section quoted is to the effect that the judgment is to be a bar to any action *by the claimant;* that this has no bearing on anything except the rights of injured claimants, and has no impact upon the Government's rights against its employees; therefore, there is no reason why the general rule should not be available to the United States, particularly in the absence of some express enactment to the contrary. In this connection it points to the statement in *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 551: "Of course there is no immunity from suit *by* the Government to collect claims for contribution due it from its joint tort-feasors. The Government should be able to enforce this right in a federal court not only in a separate action but by impleading the joint tort-feasors as a third-party defendant."

We think that the answer to these several contentions of the parties is to be found through an examination of the basis for the rule stated above which permits the employer to recover indemnity from the negligent employee. That basis is, we think, correctly stated in the Government's brief: "The action for indemnity is quasi-contractual in theory, its rationale being that the defendant is unjustly enriched by the plaintiff's payment of the injured party's

claim." Compare Restatement of the Law of Restitution, under the topic "Discharge by one person of duty also owed by another", (p. 330): "Where the payor has given something in the discharge of a duty to which the other is subject, his right to indemnity or contribution therefor is based upon the fact that he has thereby conferred a benefit upon the other."

Since the actual wrongdoer in such cases is the employee, the employer, who has been vicariously liable and who in consequence has been required to pay damages to the third person, in so doing has paid moneys which in equity and good conscience the person actually guilty of negligence ought to pay. Thus the employer has conferred a benefit upon the employee and this gives rise to an obligation which the law implies. The employer's action is one which in the words of Lord Mansfield, "lies only for money which *ex aequo et bono*, the defendant ought to refund. . . ." Moses v. Macferlan, 2 Burr. 1005, 1010. As stated by Woodward, The Law of Quasi-Contracts, §259, "In such cases, the obligation may well be rested upon quasi-contractual principles, for in so far as one tort-feasor pays what in equity and good conscience another tort-feasor ought to pay, the latter receives a benefit at the expense of the former, the retention of which is unjust." [1]

---

[1] "Other types of the right to indemnity are commonly called quasi contractual, or arising out of a 'contract implied by law'. Indemnity between persons liable for a tort falls within this type of case. As between such persons, the obligation to indemnify is not a consensual one; it is based altogether upon the law's notion—influenced by an equitable background—of what is fair and proper between the parties. It is true that the relationship of the parties, which often affords the decisive clue as to what is fair between them, may have arisen by contract, though it need not have. But in these cases the contract does not create the right to indemnity. It only creates a part of the fact situation, and it is the fact situation in its entirety, consensual and non-consensual elements both included, which gives rise to the obligation to indemnify. The quasi-contractual idea of unjust enrichment of course underlies any holding that one who has been compelled in discharging his own legal obligation to pay off a claim which in fairness and good conscience should be paid by another can secure reimbursement from the other. But in tort indemnity cases, the leading facts are apt to be acts and relationships out of which tort liabilities have arisen, and it will often follow from this that the question of unjust enrichment involved in the granting of indemnity will have to be decided on substantially the same principles as those which controlled the creation of the original tort liability." (81 Pa. Law Rev. 130, p. 146-147; "Contribution and Indemnity Between Tort-feasors", Robert A. Leflar).

When we inquire whether a rule dependent upon this rationale should apply in the instant case, we are at once confronted by the circumstance that the moment judgment was entered against the Government,[2] then by virtue of §2676, supra, the employee was no longer primarily answerable to the claimant,—he was not answerable at all. Therefore, when or if the Government paid the judgment against it, it was not paying a sum which the employee ought to have paid, for, as we have seen, any obligation on his part was completely wiped out.

It is therefore our conclusion that since any legal basis for a claim of indemnity is here lacking, the Government was not entitled to have judgment against the appellant. It is thus apparent that we do not deal with any question as to whether Section 2676 releases the Government's claim against its employee. Such is not the question here, but rather the inquiry is, whether, in the circumstances of this case any cause of action ever arose in favor of the Government and against its employee. Since the right of indemnity here asserted arises, in the case of employers generally, only by quasi-contract, through the payment of that which the employee himself, in equity and good conscience should have paid, it is manifest that here, where the employee owes no such duty the circumstances of the necessary unjust enrichment do not exist, and no cause of action ever arose in favor of the Government.

While the legislative history of the Tort Claims Act is in no sense controlling in an attempt to arrive at intended consequences of Section 2676, yet its indications are not at variance with the results here arrived at.[3]

---

[2] It would be an interesting question, which we need not examine, whether an employer's right of indemnity arises when judgment is entered against him, or only when he has paid the judgment. Thus the form of the action, at common law, was denominated one for "money paid".

[3] Thus Senate Report 1196, 77th Cong. 2d Sess., p. 5, dealing with the corresponding provision of what is now Section 2672 of Title 28 to the effect that the administrative settlement of a claim of $1000 or less "shall constitute a complete release of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim" contained the following statement: "It is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone within limits, leaving the employee at fault to be dealt with under the usual disciplinary controls." This report was made in 1942. While in footnote 8 to United States v. Yellow Cab Co., supra, some question is raised as to the force of the 1942 legislative history in construing a 1946 Act, yet Dalehite v. United States, — U. S. —,

We think it is clear from what was said in *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305, that the question of the duty owed by a Government employee to the Government is one to be determined by federal and not by state law. The cause of action which the Government here sought to enforce was not one under the Federal Tort Claims Act which adopts local law for the purpose of defining the Government's tort liability.[4] But regardless of whether state or federal law be here applied, § 2676 cuts the ground from under the Government's claim for indemnity.

It is to be noted that in using the language quoted supra from *United States* v. *Yellow Cab Co.*, the Supreme Court was not dealing with a situation involving any possible application of § 2676. The court was considering the question of contribution as between the United States and a stranger tort-feasor.

In view of what we have here said we find it unnecessary to consider appellant's further contention that the Government's claim

---

(June 8, 1953), makes it plain that Congress, in passing the Act in 1946, relied upon the 1942 reports and testimony, and the Court there quotes extensively from them including the testimony of then Assistant Attorney General Shea. At that time Mr. Shea testified: "If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by a judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck. . . . The Chairman. Mr. Shea, you are discussing and directing your remarks to the matter where, if a person is injured and files a claim against the Government and the Government satisfies that claim, that is the end of the claim against anybody? Mr. Shea. That is right. The Chairman. What is the arrangement when the Government has an employee who is guilty of gross negligence and injury results? Is there any requirement that that employee should in any way respond to the Government if it has to pay for the injury in the event of gross negligence? Mr. Shea. Not if he is a Government employee. Under those circumstances, the remedy is to fire the employee. Mr. Laughlin. No right of subrogation is set up? Mr. Shea. Not against the employee." (Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2nd Sess., on H.R. 5373 and 6463, pp. 9, 10.)

[4] For this reason no problem is posed such as that indicated in the conflicting decisions cited in *United States* v. *Lushbough*, 8 cir., 200 F. 2d 717, at p. 720. It is noted that in that case the question involved here was not reached because it was held that the Government was not liable.

should be denied for the same reasons which prompted judgment against it in *United States* v. *Standard Oil Co.*, 332 U. S. 301.

Accordingly, the judgment is reversed and the cause remanded with directions to enter judgment for appellant.

HARRISON, D. J., dissenting:

I am of the opinion that Rule 14, Federal Rules of Civil Procedure should apply in tort claims actions. The Federal Tort Claims Act waives the government's immunity from suit but nowhere does the government waive its right to sue.

The majority opinion concedes that under the common law and under the law of California, a private employer may recover from his negligent employee for losses sustained by the employer by reason of the negligent acts of the employee. *Bradley* v. *Rosenthal*, 97 P. 875; see also *Spruce* v. *Wellman*, 219 P. 2d 472.

If under *United States* v. *Yellow Cab Co.*, 340 U. S. 543, the government is liable for contribution under the law of the State of Pennsylvania, the same reasoning should apply in this case. Tort Claims Act liability is in all events secondary. The only difference as to the government's liability between the case at bar and the Yellow Cab case, supra, is that in the Yellow Cab case the government was a joint tort-feasor and as a result paid only its portion of the liability but in this case it must pay all and cannot, according to the majority seek recoupment from the one who is primarily liable.

It must be remembered that much of the litigation under the Tort Claims Act arises while the employee, in the course of his employment, is using a privately owned automobile fully covered by insurance. The ruling of the majority permits such insurance carriers to escape liability at the expense of the government. (See *U. S.* v. *Aetna Surety Co.*, 338 U. S. 366).

It is my view that to permit an employee of the government to escape liability for his tort is to place a premium on negligence and encourage collusion between the employee and the claimant. It also places the government employee in a different class from that of a private employee.

I believe that the Yellow Cab case supports my conclusions. It will be noted that the Supreme Court, on page 554 of 340 U. S., approves the language of Judge (later Justice) Cardozo in *Anderson* v. *Hayes Construction Co.*, 153 N.E. 28, 29, when it quotes him as follows:

> "* * * No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy."

By a parity of reasoning no sensible reason can be imagined why the State should paralyze its own remedy.

See also Judge Cardozo's opinion in *Schubert* v. *August Schubert Wagon Co.*, 164 N. E. 42, in which he held that the employer's right of recoupment from his negligent employee is based on breach of an independent duty owed the employer by the employee, and not on subrogation or quasi-contract.

It should also be noted that the Supreme Court cites in the Yellow Cab case 3 Moore's Federal Practice (2d ed. 1948), page 507, with approval, and I quote from the same because I feel it correctly states my conclusions:

> "Par. 14.29. Impleader By and Against the United States. Where the United States is the defendant it should be able to implead a third party in a case within Rule 14, to wit, where the United States as third-party plaintiff asserts that the third-party defendant 'is or may be liable' to it for all or part of the plaintiff's claim against it. This follows from the fact that the Rules are generally applicable to actions by and against the United States, subject to jurisdictional limitations. And where the United States is the third-party plaintiff there is no problem of sovereign immunity from suit—the sovereign is the claimant. This principle should be true (1) whether the original plaintiff's claim against the United States is one under the Tucker Act, which claim for convenience may be described as *ex contractu*, or (2) whether the claim is one under the Federal Tort Claims Act, *ex delicto*."

It is difficult for me to reconcile that Rule 14 can be used against the government and employee but cannot be used by the government against the employee.

The Tort Claims Act itself militates against this result: [1]

> 28 U.S.C.A., § 1346(b)—"* * * * the district court shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*" (Emphasis supplied.)

---

[1] *Elizabeth H. Dalehite et al.* v. *U. S.*, 1953, — U.S. —, 21 L.W. 4431.

28 U.S.C.A., § 2674.—"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances • • •"

Paraphrasing Mr. Chief Justice Taft in *Ford* v. *United States*, 273 U. S. 593, at 611—if it was the intention of Congress to waive the government's common law rights, why should it not have been expressed?

To place the government as a target without the ability to defend itself leaves the government as a litigant, subject to the laws of the State of California without the right to rely upon the laws of California as a defensive measure.

(Endorsed:) Opinion and Dissenting Opinion. Filed Aug. 3, 1953. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13305

MEAD GILMAN, JR., APPELLANT,

vs.

UNITED STATES OF AMERICA AND ALBERT CHARLES DARNELL, APPELLEES

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court, with directions to enter judgment for appellant.

(Endorsed:) Judgment. Filed and entered August 3, 1953. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13305

MEAD GILMAN, JR., APPELLANT,

vs.

UNITED STATES OF AMERICA, ET AL., APPELLEES

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-two (62) pages, numbered from and including 1 to and including 62, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of Honorable Robert L. Stern, Acting Solicitor General of the United States, counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said The United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of September, 1953.

[SEAL.]

PAUL P. O'BRIEN,
Clerk.

☆ U. S. GOVERNMENT PRINTING OFFICE 1953 275801 445

SUPREME COURT OF THE UNITED STATES

No. 449, October Term, 1953

United States of America, petitioner

vs.

Mead Gilman, Jr.

Order allowing certiorari. Filed December 14, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

CITATIONS

278258—53——1

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 449

UNITED STATES OF AMERICA, PETITIONER

v.

MEAD GILMAN, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on August 3, 1953.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California (R. 26–29) is not reported. The opinions of the Court of Appeals (R. 52–59) are reported at 206 F. 2d 846.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1953 (R. 59). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the United States may recover indemnity from a Government employee for whose negligence the Government has been held liable under the Federal Tort Claims Act.

STATUTE INVOLVED

The pertinent portions of the Federal Tort Claims Act read as follows:

> 28 U. S. C. 1346 (b).
>
> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> 28 U. S. C. 2676.
>
> The judgment in an action under section 1346 (b) of this title shall constitute a com-

plete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

STATEMENT

An action was brought against the United States by one Darnell under the Federal Tort Claims Act (28 U. S. C. 1346 (b)) for injuries arising from an automobile accident involving vehicles of Darnell and the Government (R. 3–7). Respondent, an employee of the United States Coast and Geodetic Survey, Department of Commerce, was the driver of the Government car (R. 8). The Government moved under Rule 14 (a), Federal Rules of Civil Procedure,[1] for leave

[1] "Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence

to implead respondent as a third-party defendant (R. 17–19).[2]

Upon the granting of this motion, a third-party complaint was filed, asking that if the United States should be held liable to the plaintiff it have indemnity against respondent for the full amount of its liability (R. 20–21). Respondent moved to dismiss the third-party complaint; but the district court denied the motion on the ground that, under the accepted principles of the California law of master and servant, an employer is entitled to indemnity for liability caused by his employee's negligence (R. 25–29). Upon a trial, the district court found that the plaintiff's injuries were caused solely by the negligence of respondent acting within the scope of his employment as an employee of the United States, and accordingly gave judgment against the United

---

that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant."

[2] Respondent, together with the Coast and Geodetic Survey, had been named with the United States as defendants in the plaintiff's original action. Subsequently, and before the motion to bring in respondent as third-party defendant, the action was dismissed as to both of these defendants, with the consent of the plaintiff (R. 11–16). No issue is here presented as to the propriety of these dismissals.

States under the Tort Claims Act for $5,500, with judgment over for the United States against respondent, the third-party defendant, for the same amount (R. 34–44).

The respondent appealed, contending (1) that under the doctrine of *United States* v. *Standard Oil Co.*, 332 U. S. 301, which held that the Government had no cause of action in tort for the loss of the services of a soldier injured by the negligence of the defendant, the common law action for indemnity could not be extended by the courts to the United States; and (2) that the action was barred under that section of the Tort Claims Act (28 U. S. C. 2676, *supra*, pp. 2–3), which provides that a judgment against the Government shall constitute a bar to an action by the injured person against the employee.

The court of appeals, in a 2–1 decision, reversed (R. 52–57). It held that 28 U. S. C. 2676, although by its terms it barred only actions by the injured claimant and not indemnity actions by the Government, nevertheless constituted an indirect bar. The court reasoned as follows: The cause of action for indemnity is based on the principle that the employee is unjustly enriched by an action against the employer under the doctrine of *respondeat superior*, resulting in the employer's satisfying a liability which is the primary responsibility of the employee. Since by virtue of 28 U. S. C. 2676 the entry of a judgment

against the Government, unlike the entry of judgment against a private employer, relieves the employee of further responsibility, the Government's payment of such a judgment cannot be said unjustly to enrich the employee. The court did not pass upon respondent's contention that the action was barred by the rule of the *Standard Oil* case (R. 56).

Judge Harrison, sitting by designation, dissented (R. 57). He urged that *United States* v. *Yellow Cab Co.*, 340 U. S. 543, in which this Court stated that the Government was entitled to contribution from joint tortfeasors (see *infra*, pp. 10–11), was controlling. He also urged that the Government should not be treated differently from private employers and that the rule established by the majority would encourage collusion between employees and injured claimants.

REASONS FOR GRANTING THE WRIT

The question presented is a continuing one of general importance in the administration of the Tort Claims Act. It is of potential significance in every case, now or in the future, under that Act.[3] We believe that the decision of the court

[3] Although it is open to the Government to seek indemnity in every case arising under the Act, the practice of the Government has been to restrict such claims, usually to situations in which the employee at fault is covered by liability insurance.

In the present case, a regulation of the United States Coast and Geodetic Survey contemplated that employees would

below is erroneous, conflicting with the philosophy of the Tort Claims Act and with the rationale of this Court's decision in *United States* v. *Yellow Cab Co.*, 340 U. S. 543. This Court should establish the correct rule for the entire country.

1. In claiming indemnity from its employees the Government is asserting a long established common law right of all employers. The common law right of an employer to be indemnified by its employee against liability under the doctrine of *respondeat superior* for the negligence of the employee is too well settled to require elaboration. See *e. g., Washington Gas Light Co.* v. *District of Columbia,* 161 U. S. 316, 328; *Brown & Root* v. *United States,* 92 F. Supp. 257, 262 (S. D. Tex.); *Johnston* v. *City of San Fernando,* 35 Cal. App. 2d 244, 246, 95 P. 2d 147; *Stulginski* v. *Cizauskas,* 125 Conn. 293, 296, 5 A. 2d 10, 12; *Grand Trunk Ry. Co.* v. *Latham,* 63 Me. 177; Restatement, *Agency* § 401, comment c. The rationale of this cause of action is that the employer, having done no

---

carry insurance covering their driving of Government vehicles. It provided (U. S. Coast & Geodetic Survey Regulations, par. 1080):

"TRAFFIC REGULATIONS—

* * * * *

"(b) The chief of party is authorized to require all employees operating trucks of the Bureau to obtain, at the operator's expense, a limited form of liability insurance as protection from personal liability for damage incurred while driving Government vehicles. Additional information regarding this matter may be obtained from the Washington office."

278258—53——2

tortious act, has only a secondary liability arising by imputation of law, and that the primary liability rests on the employee who has done the negligent act. Cf. *City of Chicago* v. *Robbins,* 2 Black 418; *George A. Fuller Co.* v. *Otis Elevator Co.,* 245 U. S. 489; *Oceanic Steam Nav. Co.* v. *Compania Transatlantica Espanola,* 134 N. Y. 461, 31 N. E. 987; *Boston Woven Hose & Rubber Co.* v. *Kendall,* 178 Mass. 232, 59 N. E. 657. The nature of the action against the employee is quasi-contractual; the employer, having satisfied a liability which is the primary responsibility of the employee, has thereby conferred a benefit upon the employee and is entitled to recover, in an action on a contract implied in law, the amount by which the employee is thus unjustly enriched. See, *e. g.,* Restatement, *Restitution* § 76; Woodward, *Quasi Contracts* (1913), §§ 258–259; *Brown & Root* v. *United States,* 92 F. Supp. 257, 261 (S. D. Tex.).

In asserting this right under the common law, the Government seeks only to be placed in the same position as a private employer in like circumstances. Such an assertion accords with the intention of Congress in enacting the Tort Claims Act. The Act provides that "the United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances" (28 U. S. C. 2674). Whether the Government has the right to recover indemnity bears directly on the "manner" and

"extent" of the Government's liability; to create liability while denying the right to seek indemnity subjects the United States to a greater burden than that imposed upon private individuals in like circumstances.

The legislative history of the Tort Claims Act, beginning with the tort claims bills in the 76th Congress and continuing down to its enactment in the 79th Congress (see *Dalehite* v. *United States,* 346 U. S. 15, 24–30), reveals continual modification in a direction away from statutory enunciation of particular rights and liabilities—once jurisdiction over the type of suit has been acquired—and toward reliance upon accepted principles of general law, to be applied by the courts without express statutory definition or circumscription.[4] This process of evolution indi-

[4] Thus, a provision limiting the Government's liability in cases involving joint tortfeasors to a pro rata share of the damages was eliminated, and the matter of contribution left to the courts (compare H. R. 6463 and S. 2221, 77th Cong., 2d Sess., with H. R. 181, 79th Cong., 1st Sess.); specific provisions for the distribution of proceeds of wrongful death actions, for the defense of contributory negligence, for aggravation of damages, and for payment of the amount of the judgment when the claimant dies pending disposition of his claim, were dropped, and the questions left to local law (see Hearings Before House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess., p. 27); and express procedural provisions in matters such as pretrial depositions and physical examinations were dropped in favor of reliance on the Rules of Civil Procedure. See Memorandum for Use of the Committee on the Judiciary Explanatory of H. R. 5373, 77th Cong., 2d Sess., p. 26.

cates the Congressional purpose to leave as much as possible of the substantive principles to be applied under the Act to the ordinary rules of law, and to provide expressly only for the minimum requirements. The absence from the Act of express reference to a right of indemnity is thus accounted for by the broad provision assimilating the United States to a private individual, which covers such a right along with others.

In a similar vein, despite the absence of a specific provision covering the question of contribution among joint tortfeasors, this Court has held, as a part of the rationale of *United States* v. *Yellow Cab Co.*, 340 U. S. 543, that, where the negligence of a government employee and that of a private individual concur in causing damage, the United States would be entitled to contribution from the joint tortfeasor if the law of the place permitted.[5] The precise issue presented in the *Yellow Cab* case was whether a private individual could recover contribution from the United States. But as part of its reasoning the Court stated (340 U. S. at 551): "Of course there is no immunity from suit *by* the Government to

[5] The right of indemnity, we believe, should depend not on the law of the place but on federal common law. Unlike actions for contribution, actions for indemnity arising out of actions under the Tort Claims Act involve no private individuals, but only the relationship between the Government and its employees. This relationship is distinctively federal. Cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301, 305–311. The court below correctly so held (R. 56).

collect claims for contribution due it from its joint tort-feasors." This holding should be extended to the comparable situation presented by this case.

2. The court below, not denying the force of the foregoing arguments, held the action barred by an express provision of the Tort Claims Act, *i. e.*, 28 U. S. C. 2676. This view is, we think, erroneous. 28 U. S. C. 2676 reads as follows:

> The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

By its very terms this section refers only to the rights of injured claimants and has no bearing on the Government's rights against its employees. Moreover, its primary purpose was to protect not employees but the Government. In enacting it, Congress was concerned with the fact that in many cases the Government would be compelled, in the interests of morale and good relations with its employees, to defend actions brought by injured claimants directly against the employees. Enactment of the Tort Claims Act would then subject the Government to the necessity of twice defending actions based on the same injury, once on behalf of the employee and once on its own behalf. It was thought desirable to prevent duplicate actions against both the Government and

the employees. See *e. g.*, Hearings Before House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess., pp. 9–10.[6] The provision making a judgment in a suit under the Act a bar to a subsequent action against the employee would, it was believed, tend to cause all actions to be brought under the Tort Claims Act and to eliminate suits against the employee directly, since the holder of a judgment against the Government is assured of satisfaction. But nothing in the legislative history suggests the clear purpose on the part of Congress to deny indemnity which would be necessary to require a decision in derogation of the Government's common law right, where for administrative reasons the Government chooses to assert its right. Certainly, there is no legal bar to suits against the employee where the injured person chooses for any reason to proceed against him rather than against the Government. Both before and after enactment of the Tort Claims Act employees of

[6] In testifying in the House committee on this aspect of the bill in the 77th Congress, a representative of the Department of Justice suggested that, in his view, the Government would have no right of indemnity and would be left to its remedy of firing the negligent employee or taking other disciplinary action. See Hearings, *supra* at p. 10. This suggestion also appeared in S. Rept. No. 1196, 77th Cong., 2d Sess., p. 5. However, this testimony was given without reference to the situation of insured employees (see fn. 3, *supra*, pp. 6–7) and was not rested on any prohibition or provision in the Act.

the Government have been subject to suit for their own negligence. See 40 Ops. Atty. Gen. 38, and cases cited.[7] Thus, under 28 U. S. C. 2676, the employee is merely an incidental beneficiary of a provision aimed at protecting the Government but which does not prevent suit against him until judgment is entered against the United States.

The court below did not reject these arguments. It held, however, that 28 U. S. C. 2676 had an indirect bearing. Accepting the view that the action for indemnity was based on the quasi-contractual theory that satisfaction by the employer of a judgment based on the tortious conduct of its employee confers a benefit on the employee for which the employer should receive restitution (see *supra*, pp. 7–8), the court held that 28 U. S. C. 2676 had the effect of extinguishing the benefit and thereby precluding the right of restitution. It argued that since, under the statutory provision, the entry of judgment against the Government terminated the responsibility of the employee for his own negligence, payment of the judgment no longer conferred a

[7] 40 Ops. Atty. Gen. 38 held that the Government could not administratively compel an employee to indemnity it. But this opinion is not inconsistent with our position here. Its reasoning was that to allow administrative action would deprive the employee of his day in court. Clearly, this rationale is not inconsistent with an action to recover indemnity.

benefit on the employee, the employee was not unjustly enriched, and the Government was accordingly not entitled to restitution.

This argument is fallacious. The employee is liable to suit by the injured person at any time up to the entry of judgment against the Government, and therefore the very fact that the judgment extinguishes this liability confers a decided benefit upon the employee, amounting to unjust enrichment for which he can be held accountable. The initial source of this benefit was the enactment of the Tort Claims Act and it is therefore attributable to the United States. Cf. *Terminal R. Ass'n* v. *United States,* 182 F. 2d 149 (C. A. 8).

The court below disclaimed any suggestion that its decision was based on the theory that liability for indemnity does not arise until payment of the judgment against the Government (cf. *Dunn* v. *Uvalde Asphalt Paving Co.,* 175 N. Y. 214, 67 N. E. 439) and that at the time of payment the employee is not enriched because his liability has been extinguished by the entry of judgment (see R. 55, n. 2). Moreover, such a theory is contrary to generally accepted principles of the law of restitution. Restatement, *Restitution* § 78, comment c, states the law as follows:

> A person who has become secondarily liable upon a transaction * * * because of the fault of another is entitled to resti-

> tution from the other if he performs a duty owed by him to the creditor [*i. e.*, the injured person], even though before such performance the duty of the other has terminated. * * *

This principle is illustrated by the rule that the employer may recover indemnity from the employee even though at the time of the employer's payment an action by the injured claimant against the employee was barred by limitations. Cf. *Reed* v. *Humphrey,* 69 Kan. 155, 76 Pac. 390; *Godfrey* v. *Rice,* 59 Me. 308, 310; *Sibley* v. *McAllaster,* 8 N. H. 389. Likewise, the employer is entitled to indemnity even though the injured claimant's action against the employee is barred because the employee and the injured claimant are husband and wife. See, *e. g., Schubert* v. *Schubert Wagon Co.,* 249 N. Y. 253, 257, 164 N. E. 42, 43; *Hudson* v. *Gas Consumers' Ass'n,* 123 N. J. L. 252, 254, 8 A. 2d 337, 339.

3. The court below expressly refrained (R. 56–57) from passing upon the respondent's contention, based on *United States* v. *Standard Oil Co.,* 332 U. S. 301, that the courts may not apply the public policies on which common law liabilities are based to create causes of action for the benefit of the United States. The respondent contended that, like the cause of action for the loss of the services of a soldier asserted by the Government in the *Standard Oil* case, the cause of action for indemnity involves fiscal policy and may be created

only by Congress. But it seems clear that principles laid down in that decision should not be applicable to the present case.

a. The *Standard Oil* opinion recognized that many causes of action on behalf of the United States exist without express statutory basis. It relied on *Cotton* v. *United States,* 11 How. 229, which asserted the classic principle that "as a corporation or body politic [the United States] may bring suits to enforce their contracts and protect their property" (11 How. at 231). This principle clearly covers not only actions on express contracts but also the numerous kinds of cases in which the Government is permitted to maintain actions based on various quasi-contractual obligations or contracts implied in law. Examples are, among many, the right of the United States to recover money paid by it under mistake of law or fact (*e. g., Wisconsin C. R. R. Co.* v. *United States,* 164 U. S. 190), and the right of the United States as drawee of a check to recover money paid on a forged endorsement. *E. g., Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *United States* v. *National Exchange Bank,* 214 U. S. 302.

The cause of action for indemity in the present case, being quasi-contractual in theory, falls squarely within the doctrine of these cases. By its own terms, the *Standard Oil* decision amounts only to a prohibition against the creation of "new" causes of action in tort (cf. *United States* v. *Silliman,* 167 F. 2d 607 (C. A. 3), certiorari de-

nied, 335 U. S. 825); it does not apply to recognized quasi-contractual actions. See also the Government's petition for a writ of certiorari in *United States* v. *Capps,* No. 331, this Term, pp. 23–26.

b. Moreover, in *Standard Oil* the Government sought to extend the policy of the common law to a new field of tort law and was in effect asking for the creation of a new kind of right, while here it is asking only the recognition of a well settled right in an old field. There, the asserted right of action was for the loss of the services of a soldier injured by the negligence of the defendant, on the analogy of the parallel protection afforded the relationships of master and servant, husband and wife, and parent and child. But the very relationship or status for which protection was sought—the so-called Government-soldier relationship—was necessarily unique. No parallel relation could exist in private law; since the end of the feudal system only governments have had soldiers. The Government was seeking enforcement of a unique right, one necessarily lacking common law precedent, although it had common law analogues. The master-servant relationship, on the other hand, is not peculiar to the Government. The rules regarding the protection to be afforded it have been fully developed in private law. It is only necessary to provide this protection for another employer, which happens in this case to be the Government. No cre-

ation of a new cause of action is sought—only nondiscriminating application of an existing one.

c. Finally, the *Standard Oil* case rests on the consideration that Congress had long been aware of the problem of injuries to soldiers and had not seen fit to do anything about it. In the present case, apart from the fact that the problem of indemnity has existed only since the passage of the Tort Claims Act in 1946, there is evidence that Congress' failure to act arises not from a belief that the Government should not be allowed to recover, but rather from the belief that it is entitled to recover under the law as it now stands. This is the theme of reports of congressional committees studying private legislation for the relief of Government employees who have been sued for their torts by claimants electing to sue the employee rather than the Government. For example, Private Law No. 820, 82nd Congress, was a bill for the relief of the driver of a mail truck who had been held liable for negligence and who, Congress felt, had not been seriously at fault. In considering whether the equities of the situation warranted granting relief to this employee, the Senate Committee pointed out (S. Rept. No. 2025, 82d Cong., 2d Sess., p. 2):[8]

> With respect to the Government employee, in this case a postal carrier, it must

[8] It has been the practice of Congress to consider claims for reimbursement by employees who have been sued for

> be borne in mind that as between the United States and one of its employees the ultimate responsibility for the negligence of the employee rests on the employee's shoulders. Even when a judgment has been obtained under the Federal Tort Claims Act the United States has a right of action over against the employee.

Congressional inaction in this area of indemnity is thus explained by Congress' belief that no legislation is necessary to achieve the result here urged by the Government.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

OCTOBER 1953.

---

torts committed in the course of their employment and to allow such claims where the equities warranted. *E. g.*, Pvt. L. 820, 82nd Congress. However, Congress has recognized that in a proper situation the Government might allow the burden to rest upon the employee. The action for indemnity permits this decision to be made at the instance of the executive branch rather than by the legislature. See fn. 3, *supra*, pp. 6–7.

U. S. GOVERNMENT PRINTING OFFICE: 1953

INDEX

289250—54——1

CITATIONS

Cases: Page

In the Supreme Court of the United States

OCTOBER TERM, 1953

NO. 449

UNITED STATES OF AMERICA, PETITIONER

v.

MEAD GILMAN, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California (R. 26–29) is not reported. The opinions of the Court of Appeals (R. 52–59) are reported at 206 F. 2d 846.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1953. The petition for a writ of certiorari was filed on October 30, 1953, and was granted on December 14, 1953 (R. 61). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the United States may recover indemnity from a government employee for whose negligence the Government has been held liable under the Federal Tort Claims Act.[1]

STATUTE INVOLVED

The pertinent sections of the Federal Tort Claims Act provide as follows:

28 U. S. C. 1346 (b).

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accord-

[1] Two cases (*United States* v. *Jevarijian and Harrison* v. *United States*) presenting the question here involved are currently pending in the Courts of Appeals for the Second and Fourth Circuits respectively. We are advised that those cases will not be decided until this Court enters its opinion in the instant case.

ance with the law of the place where the act or omission occurred.

28 U. S. C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. * * *.

28 U. S. C. 2676.

The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

STATEMENT

An action was brought against the United States by one Darnell under the Federal Tort Claims Act (28 U. S. C. 1346 (b)) for injuries arising from an automobile accident involving vehicles of Darnell and the Government (R. 3–7). Respondent, an employee of the United States Coast and Geodetic Survey, Department of Commerce, was the driver of the government car (R. 8).[2] The Government moved under Rule 14

[2] A regulation of the United States Coast and Geodetic Survey contemplated that employees would carry insurance covering their driving of government vehicles. It provided (U. S. Coast & Geodetic Survey Regulations, par. 1080):

"TRAFFIC REGULATIONS—

(a), Federal Rules of Civil Procedure,[3] for leave to implead respondent as a third-party defendant (R. 17–19).[4]

* * * * *

"(b) The chief of party is authorized to require all employees operating trucks of the Bureau to obtain, at the operator's expense, a limited form of liability insurance as protection from personal liability for damage incurred while driving Government vehicles. Additional information regarding this matter may be obtained from the Washington office."

[3] "Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant."

[4] Respondent, together with the Coast and Geodetic Survey, had been named with the United States as defendants

Upon the granting of this motion, a third-
arty complaint was filed, asking that, if the
nited States should be held liable to the original
laintiff, it have indemnity against respondent
or the full amount of its liability (R. 20–21).
espondent moved to dismiss the third-party
omplaint. The district court denied the motion
n the ground that, under accepted principles of
ne California law, an employer is entitled to
ndemnity for liability resulting from his em-
loyee's negligence (R. 25–29). Upon a trial,
ne district court found that the plaintiff's in-
uries were caused solely by the negligence of
espondent acting within the scope of his em-
loyment as an employee of the United States,
nd accordingly entered judgment against the
nited States under the Tort Claims Act for
5,500, and judgment over for the United States
gainst respondent, the third-party defendant,
or the same amount (R. 34–44).

The respondent appealed, contending (1) that
nder the rationale of *United States* v. *Standard*
il Co., 332 U. S. 301, which held that the Gov-
rnment in the absence of statute could not re-
over for the loss of the services of a soldier
njured by the negligence of a third-party tort-

the plaintiff's original action. Subsequently, and before
ne motion to bring in respondent as third-party defendant,
ne action was dismissed as to both of these defendants, with
ne consent of the plaintiff (R. 11–16). No issue is here
resented as to the propriety of these dismissals.

feasor, the common law action for indemnity was also not available, in the absence of statute, to the United States; and (2) that the action was barred under that section of the Tort Claims Act (28 U. S. C. 2676) which provides that a judgment in an action under 28 U. S. C. 1346 (b) shall constitute a complete bar to any action by the injured person against the employee of the Government.

Without passing upon respondent's contention that the action was barred by the rule of the *Standard Oil* case (R. 56), the court of appeals, in a 2–1 decision, reversed the third-party judgment of the district court (R. 52–57). It held that although 28 U. S. C. 2676, by its terms, pertained only to actions by the injured claimant and not to an indemnity action by the Government, it constituted an indirect bar to the third-party action for indemnity. The court reasoned as follows: The cause of action for indemnity is based on the principle that the employee is unjustly enriched by an action against the employer under the doctrine of *respondeat superior,* resulting in the employer's satisfying a liability which is the primary responsibility of the employee. Since by virtue of 28 U. S. C. 2676 the entry of a judgment against the Government, unlike the entry of judgment against a private employer, relieves the employee of further responsibility, the Government's payment of such a

judgment cannot be said unjustly to enrich the employee.

Judge Harrison, sitting by designation, dissented (R. 57). He urged that *United States* v. *Yellow Cab Co.*, 340 U. S. 543, in which this Court stated that the Government was entitled to contribution from joint tortfeasors, was controlling. He also urged that the Government should not be treated differently from private employers and that the rule established by the majority would encourage collusion between employees and injured claimants.

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

1. In holding that the United States may not recover indemnity from its employee for whose negligence the United States has been held liable under the Federal Tort Claims Act.

2. In holding that a judgment against the United States under 28 U. S. C. 1346 (b) bars the United States from asserting a right of indemnity against its negligent employee.

3. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

A.

1. A private employer has a right of indemnity against an employee where the employer has been cast in damages on *respondeat superior* principles solely by reason of the negligence of the

employee. The nature of the action is quasi-contractual and it is based on the theory of unjust enrichment. Restatement, *Restitution* § 76; Woodward, *Quasi Contracts* (1913) §§ 258–259.

2. (a) The Tort Claims Act, by imposing liability on the United States for the negligent acts of its employees, has placed it generally in a position corresponding to that of a private employer. Without specific statutory authorization, it has been held that, under the Act, the United States is both entitled to receive and must give contribution (*United States* v. *Yellow Cab Co.,* 340 U. S. 543), and that it is entitled to be indemnified by a third-party tortfeasor (*United States* v. *Savage Truck Lines,* Nos. 6648–6651, decided December 21, 1953, C. A. 4). No logical reason exists for withholding from the United States the comparable right of indemnity against the negligent employee which all private employers have. It has long been settled that no specific statutory authority is required for the assertion by the United States of a conventional common law action. *Cotton* v. *United States,* 11 How. 229, 231. This rule applies equally to actions based on quasi-contractual principles. *Wisconsin Central R. R. Co.* v. *United States,* 164 U. S. 190.

(b) *United States* v. *Standard Oil Company,* 332 U. S. 301, is not to the contrary. There, the United States, relying on the special relationship between it and a soldier, sought to invoke

the ancient action *per quod servitium amisit* to recover for loss of services and the attendant expenses of medical care. It was conceded that no exact precedent existed and that a *new* right had to be created. The Court declined to extend the doctrine into new fields, holding that Congress, rather than the courts or the executive, should provide such an extension, as the issue primarily involved a fiscal matter concerning which Congress was fully aware and in respect of which it had not acted. Here, on the other hand, there is no special status but only the normal employer-employee relationship; the right sought by the United States is not new but traditional; and there is no long awareness of the problem on the part of Congress, coupled with a manifest disinclination to provide a remedy.

B.

Since the right of indemnity is a quasi-contractual right which the United States can enforce without specific statutory authorization, Congress would have had to make an explicit provision in the Tort Claims Act had it been intended to preclude the United States from asserting its traditional common law right. There is no such provision, and the legislative history of the Act indicates, on the contrary, that the ordinary incidents of a tort action against an employer are to apply.

1. The legislative history of the Act, beginning with the 76th Congress and continuing down to the date of its enactment by the 79th Congress,

discloses a continual departure from statutory enunciation of particular rights and liabilities—other than jurisdictional ones—and a tendency to rely upon accepted principles of general law. For instance, though the right to contribution is not spelled out, it is available. *United States* v. *Yellow Cab Co.*, 340 U. S. 543. This tendency, of itself, rebuts any presumption that Congress had any purpose to circumscribe conventional common law remedies available to the United States.[5]

2. 28 U. S. C. 2676 does not defeat the right of the United States to indemnity. That section provides that a judgment in a tort action against the United States shall constitute a complete bar to any action by the claimant against the employee. By its very terms, it applies to the claimant only, and in enacting it Congress was not influenced by any desire to immunize the employee but rather by the consideration that government personnel were called upon to defend suits against the employee personally. In effect, the provision is the analogue of the general rule that satisfaction of a judgment against the employer absolves the negligent employee; the provision

[5] Such legislative history as is available indicates that it was not intended in the draft bill before the 77th Congress to seek reimbursement from the employee where an *administrative* settlement was made; but in that aspect affirmative legislative action would be necessary in order to impose liability on the employee, as an administrative settlement, unlike a suit, is a voluntary assumption of liability. See 40 Op. Atty. Gen. 38.

has the virtue of removing any question which might arise in one or more of the states, the laws of which would otherwise control.

The reasoning of the court below in respect to Section 2676 is fallacious. The imposition of liability upon the United States where it is the employer is a benefit to the employee, and the fact that he is thereby released from liability to the injured claimant does not exonerate him from liability to his principal on unjust enrichment principles. Restatement, *Restitution*, §§ 76, 78, 86.

ARGUMENT

THE UNITED STATES MAY RECOVER INDEMNITY FROM AN EMPLOYEE FOR WHOSE NEGLIGENCE THE UNITED STATES HAS BEEN HELD VICARIOUSLY LIABLE UNDER THE FEDERAL TORT CLAIMS ACT

INTRODUCTION

This third-party action was brought by the United States to recover over from respondent, its employee, the amount for which it might be held liable for damages allegedly caused by respondent's negligence.[6] After judgment had been

[6] It is the position of the Government that it may seek indemnity in each case arising under the Act. In determining whether to assert the right in a particular case, the United States, like any private litigant, is largely influenced by the financial responsibility of the negligent employee. The financial responsibility of employees of the United States had been found inadequate to compensate private individuals for damages resulting from their negligent acts. This led first to the spate of private bills which preceded the enactment of the Tort Claims Act, and now constitutes the

entered in favor of the injured party, the trial court, citing California law, held that the fact that the employer in this case was the United States and the employee a civilian employee did not affect the general rule allowing indemnity to an employer, and entered judgment for the United States against the respondent for the full amount of the original award (R. 26–44). On appeal, the court below reversed (R. 52–57). The court of appeals correctly concluded that federal and not state law controlled, that the action of indemnity was *quasi contractual* in theory, and that it was based upon the concept of unjust enrichment resulting from the benefit conferred upon the employee by the employer's discharge of an obligation which, in equity and good conscience, the employee, the one who was actually guilty of the negligence, ought to have paid. In holding that the Government was not entitled to indemnity, however, the court reasoned that upon the entry of a judgment against the United States in an action under the Tort Claims Act, 28 U. S. C. 2676 (*supra*, p. 3) made the employee no longer

basic reason for resort to suit against the United States under the Tort Claims Act, even though the plaintiff is compelled to forego the right to a trial by jury which he would have in a suit against the government employee. The same reason makes it impracticable for the United States to assert its right of indemnity in any appreciable number of cases. In practice, therefore, assertion of the right has been limited to instances where the employee is insured and where restitution would work no financial imposition upon the employee himself. See fn. 2, *supra*, pp. 3–4, and fn. 18, *infra*, pp. 24–25.

answerable to the claimant; that payment of the judgment by the Government was not, therefore, the payment of a sum which the employee ought to have paid and conferred no benefit upon the employee. Hence, the court concluded, there was no basis for the Government's claim of indemnity.[7]

In seeking restitution from its agent, the United States asks only for nondiscriminatory application to it, as an employer, of the historic rule of the common law which recognizes the employer's rights over against the employee. We therefore agree with the court's analysis of the nature of the action for indemnity in these circumstances. The Court's basic error lies in the incorrect effect it ascribes to Section 2676 of the Tort Claims Act, which, on its face, is a limitation only on the rights of a claimant and affords no basis for treating the United States differently from a private employer in the same circumstances.

Going further than the Court of Appeals, respondent has argued that the United States is

[7] Though of the opinion that the question of the duty owed by a government employee to the Government was to be determined by federal rather than state law, the court below indicated that its result would be the same whether state or federal law be applied. We believe that the right of indemnity in the circumstances of this case, involving as it does only the federal relationship of the Government and its employee, and the quasi-contractual rights of the United States arising out of such relationship, is a right which commands uniform recognition throughout the United States and should not be dependent upon local law. *United States* v. *Sandard Oil Co.*, 332 U. S. 301, 305–311.

precluded from seeking indemnity, not only by 28 U. S. C. 2676, but also by the nature of an indemnity action, as he interprets it, and the aims of the Tort Claims Act, as he conceives them. It is, therefore, appropriate for us to begin by discussing the common-law action for indemnity and the right of the United States, as employer, to maintain such a suit without specific statutory authorization. *Infra*, pp. 14 *ff.* After showing that the Government has the employer's normal right to bring an indemnity action against the employee, we shall show that nothing in the Tort Claims Act deprives the Government of this right, but rather that the Act's structure and history reveal a Congressional purpose to follow the conventional law in this respect. *Infra*, pp. 27 *ff.* In this connection, we shall discuss the error in the court of appeals' reading of 28 U. S. C. 2676 (*infra*, pp. 31–41).

A. THE COMMON LAW ACTION FOR INDEMNITY, OPEN TO A PRIVATE EMPLOYER, MAY BE ASSERTED BY THE UNITED STATES WHERE IT HAS BEEN HELD LIABLE TO A THIRD PARTY AS A RESULT OF THE NEGLIGENCE OF AN EMPLOYEE

1. *A common law action for indemnity arises whenever an employer is held liable for damages because of the negligence of his employee.*—It is well settled at common law that an employer who responds in damages to a third person solely by reason of the negligence of an employee is en-

titled to be indemnified by the employee whose negligence gave rise to the claim.[8] This right of an employer is a classic illustration of the general principle that, whenever the wrongful act of one person results in liability being imposed upon another, the latter may have indemnity from the person actually guilty of the wrong. *Chicago City* v. *Robbins,* 2 Black 418; *Washington Gas Co.* v. *Dist. of Columbia,* 161 U. S. 316, 328; *Gray* v. *Boston Gas Light Co.,* 114 Mass. 149. The principle applies in a variety of circumstances: Where a municipal corporation has been held liable for a defective street occasioned by the neglect or failure of another to perform a legal duty (*Washington Gas Co.* v. *Dist. of Columbia,* 161 U. S. 316); where a property owner has been

[8] *Washington Gas Co.* v. *Dist. of Columbia,* 161 U. S. 316, 328; *Brown & Root* v. *United States,* 92 F. Supp. 257, 262, (S. D. Tex.), affirmed, 198 F. 2d 138 (C. A. 5); *Johnston* v. *City of San Fernando* (Calif.) 35 C. A. 2d 244, 246, 95 P. 2d 147; *Myers* v. *Tranquility Irr. Dist.* (Calif.) 26 C. A. 2d 385, 389, 79 P. 2d 419; *Bradley* v. *Rosenthal,* 154 Cal. 420, 424, 97 P. 875; *Smith* v. *Foran,* 43 Conn. 244; *Lough* v. *John Davis & Co.,* 30 Wash. 204, 209–210, 70 P. 491; *Railroad* v. *Greer,* 87 Tenn. 698, 702–703, 11 S. W. 931; *Grand Trunk Railway Co.* v. *Latham,* 63 Me. 177; *Costa* v. *Yochim,* 104 La. 170, 28 So. 992; *Ga. So. & Florida Ry. Co.* v. *Jossey,* 105 Ga. 271, 31 S. E. 179; *Green* v. *New River Co.,* [1792] 4 T. R. 589; *Yeomans* v. *Legh,* [1837] 2 M. & W. 419; *Weld-Blundell* v. *Stephens,* [1919] 1 K. B. 520, 536; *Jones* v. *Manchester Corp.,* [1952] 1 T. L. R. 1589, 1593; Restatement, *Agency* § 401, comment c; Mechem, *Agency* (2d Ed.) §§ 1292, 1293; *Cooley, Torts* (3d Ed.) pp. 255, 1172–1173; Smith, *Master & Servant, England & Canada* (1906) p. 93; Salmond, *The Law of Torts* (10th Ed.) p. 78.

compelled to pay damages for a defective wire attached to the chimney of the owner's house by another (*Gray* v. *Boston Gas Light Co.,* 114 Mass. 149); where the occupier of premises has been held liable for the faulty condition of the owner's property (*Chicago & N. W. Ry. Co.* v. *Dunn,* 59 Iowa 619, 13 N. W. 722); where a retailer has been held liable for a manufacturer's defective product (*Hughes Provision Co.* v. *La Mear Poultry & Egg Co.* (Mo.) 242 S. W. 2d 285); and where a prime contractor has been held liable for the fault of an independent subcontractor (*George A. Fuller* v. *Otis Elevator Co.,* 245 U. S. 489).

The practical effect of the application of this principle is to visit the financial responsibility for an injury upon the person who, as between those legally liable to the injured person, is the actual wrongdoer. In such cases the law implies an obligation on the part of the delinquent party to reimburse the one who, by discharging the liability, has thereby conferred a benefit upon the actual wrongdoer, for which, in equity and good conscience, he must make recompense. *Terminal R. R. Assn.* v. *United States,* 182 F. 2d 149, 151 (C. A. 8), certiorari denied, 340 U. S. 825; *George's Radio* v. *Capital Transit Co.,* 126 F. 2d 219, 222 (C. A. D. C.); *Crab Orchard Imp. Co.* v. *Chesapeake & O. Ry. Co.,* 115 F. 2d 277, 282 (C. A. 4); Restatement, *Restitution,* § 76; Woodward, *Quasi Contracts,* § 259; Leflar, *Contribution and Indemnity Between Tortfeasors,* 81 U. of Pa.

L. Rev. 130; *Port Jervis* v. *Port Jervis First Nat. Bank,* 96 N. Y. 550; *Churchill* v. *Holt,* 127 Mass. 165.

2. (a) *The United States, as employer, may maintain a conventional action for indemnity without specific statutory authorization.*—By the Federal Tort Claims Act Congress has placed the United States, in general, on a legal parity with a private employer with respect to liability for the "negligent or wrongful act or omission" of its employees "while acting within the scope" of employment (28 U. S. C. 1346 (b)). The obligation of the United States to persons injured through the tortious acts of its agents, like the liability of a private employer, has its roots in the common law doctrine of *respondeat superior.* The obligation, prior to the Tort Claims Act, was recognized as a matter of legislative grace through the practice of affording limited relief through private bills in Congress.[9] The

[9] Cf. Small Tort Claims Act of December 28, 1922, 42 Stat. 1066. In 40 Op. A. G. 38, it was ruled that the Secretary of Agriculture was without express or implied authority *administratively* to deprive an employee of compensation in satisfaction of a damage claim adjusted under the 1922 Act and occasioned by the employee's negligence. It was intimated in the opinion that if reimbursement were to be attempted the employee would be entitled to his day in court (*Id.*, pp. 39–40), a condition wholly satisfied in the instant case since respondent, under Rule 14 (a) (*supra*, p. 4), was at liberty to assert against the original plaintiff as well as the United States "any defenses which the third-party plaintiff has to the plaintiff's claim."

Tort Claims Act "merely substitutes the District Courts for Congress as the agency to determine the validity and amount of the claims" (*United States* v. *Yellow Cab Co.*, 340 U. S. 543, 549) and thereby converts what was theretofore a moral obligation,[10] by reason of the sovereign's immunity, into a legal obligation enforceable through the courts. The derivative character of the obligation remains the same, but, by virtue of the Act, recovery on a tort claim is no longer a matter of legislative grace. Instead, the Government now stands on a plane with a private employer and may be *compelled* to respond to an injured person for the negligent acts of an agent.

In assuming the burden of liability common to a private employer, it would seem that the United States should be entitled to the corresponding rights resulting therefrom, such as the right to contribution and indemnity. In accordance with this view and without specific statutory authorization, it has been held that the United States is entitled to contribution from a joint tortfeasor (*United States* v. *Yellow Cab Co.*, 340 U. S. 543),[11] and that it is entitled to indemnity from a third-party tortfeasor (not

[10] The relief afforded claimants through private bills partakes of a legislative gratuity founded only on a moral obligation and does not create a right of restitution. Cf. *Restatement, Restitution*, § 112.

[11] "Of course there is no immunity from suit *by* the Government to collect claims for contribution due it from its joint tort-feasors. The Government should be able to enforce

a Government employee) who is primarily liable (*United States* v. *Savage Truck Lines,* Nos. 6648–6651, decided December 21, 1953, 2d C. A. 4). See also *infra,* pp. 27 *ff.* The nature of the liability of the United States and its right to indemnity in this case is the same as that which gave rise to the right of contribution and the right of indemnity in those cases and, we submit, logically compels a like result.

Thus, by the judgment against it in the original action, the United States is compelled to discharge a liability which, as between it and its employee, is primarily that of the latter. It is the employee's wrongful conduct which forms the gravamen of the claim against the United States and for which the employee is personally and primarily responsible. The liability of the United States, on the other hand, stems solely from the employer-employee relationship. Under established principles of law, any private employer in these circumstances may maintain an action against the negligent employee for indemnification. See *supra,* pp. 14–17. As an employer, the United States is in the same position.

For the United States to maintain such a suit, predicated on quasi-contractual principles, no special statutory authorization is necessary (cf. *Clearfield Trust Co.* v. *United States,* 318 U. S.

---

this right in a federal court not only in a separate action but by impleading the joint tort-feasor as a third-party defendant." (340 U. S. at 551–552.)

363, 368; *United States* v. *Carter,* 217 U. S. 286; *Wisconsin Central R. R. Co.* v. *United States,* 164 U. S. 190), but the claim may be asserted as an exercise of the inherent powers of the United States, in its dual role as a political entity and employer, to safeguard its rights and assets. Cf. *Dugan* v. *United States,* 3 Wheat. 172, 179–180; *United States* v. *Buford,* 3 Pet. 12; *United States* v. *Bank of the Metropolis,* 15 Pet. 377; *Cotten* v. *United States,* 11 How. 229; *McElrath* v. *United States,* 102 U. S. 426, 440–441; *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273, 279, 284; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *United States* v. *California,* 332 U. S. 19, 27; *United States* v. *Silliman,* 167 F. 2d 607 (C. A. 3), certiorari denied, 335 U. S. 825.[12] Accordingly, the United States may normally recover on quasi-contracts, including the quasi-contractual right of indemnity, without specific statutory authorization.

(b) *United States* v. *Standard Oil Company, 332 U. S. 301, is not to the contrary.*—Respondent has urged below that, despite these established rules, *United States* v. *Standard Oil Company,* 332 U. S. 301, bars this indemnity action against the negligent employee. There, the Government

[12] "It is not denied that Congress has given a very broad authority to the Attorney General to institute and conduct litigation in order to establish and safeguard government rights and properties." *United States* v. *California,* 332 U. S. 19, 26–27. See 5 U. S. C. 291, 309 and 28 U. S. C. 1345.

brought suit in tort against the party who had injured a soldier for the loss of the soldier's services, invoking by analogy the principles of the ancient action *per quod servitium amisit.* The Court held that that type of action had never been applied to the loss of the services of a soldier and, in the absence of specific legislative direction, declined to extend that doctrine into what it conceived to be a novel field. It reasoned that losses of the type for which the Government there claimed compensation were matters concerning which Congress was fully advised and that, as a fiscal matter, Congress would have provided for correcting the situation had it deemed it desirable so to do.

Besides being strongly urged in the court below by respondent, the *Standard Oil* case has been invoked in a number of instances for the purpose of precluding any action by the United States for the recovery of monies on the ground that, where fiscal affairs are involved concerning which a congressional awareness exists, no action may be maintained in the absence of explicit statutory authorization. Cf. *United States* v. *Guy W. Capps, Inc.,* 204 F. 2d 655, petition for writ of certiorari granted November 16, 1953, No. 331, this Term. We submit that the *Standard Oil* case has no such broad implications and is inapplicable to the type of action here brought.

(i) The employer-employee relationship between the Government and its employees involves

none of the unique characteristics present in the *sovereign-soldier* relationship with which this Court was concerned in *United States* v. *Standard Oil Co.*, 332 U. S. 301. While the latter relationship is without private parallel and an action based upon the tortious interference with that relationship was without common law precedent,[13] the right of an *employer* to recover from his *employee* for damages which he has been compelled to pay as a result of the employee's negligence has always been recognized as maintainable by way of suit based on quasi-contract or unjust enrichment. It is only necessary to provide this protection for another employer, which happens in this case to be the United States. No creation of a new cause of action, a new right, is sought—only the nondiscriminatory application of an existing one. *Standard Oil* itself points out expressly (332 U. S. at 315, fn. 22) that no special statutory authorization is required where the United States merely seeks to enforce a traditional remedy.[14]

---

[13] In *Standard Oil*, the Court repeatedly noted that the Government urged the creation of a *new* right. "The Government does not contend that the liability sought has existed heretofore. It frankly urges the creation of a new one." 332 U. S. at 314, fn. 21; see also 332 U. S. at 311–316.

[14] The right of the United States to maintain an indemnity action against its employee is supported by *Burks* v. *United States*, 116 F. Supp. 337, 340 (S. D. Tex.); 3 Moore's *Federal Practice* (2d ed.), pp. 507–514; Prosser, *Torts*, p. 1114; Comment, 56 Yale Law Jour. 534, 560 n. 117; 33 A. B. A. J. 857, 859.

(ii) There is nothing in the relationship of the Government and its employees warranting a discriminatory treatment of the United States with respect to its rights as an employer, or a more preferential treatment of a Government employee with respect to common law liabilities. In this respect, the Government employee has always been on a par with the private employee. The employee's liability for tortious conduct is not new and the only novelty of the case is that the liability now runs to the United States instead of the injured claimant. Significantly, Congress never saw fit to extend the sovereign immunity of the United States to its agents but was content, in most cases, to let responsibility fall where the law placed it. In light of the historic inaction of Congress in this field, it would require, we believe, explicit affirmative language to conclude that Congress has placed a premium upon negligent conduct by absolving, in all cases, the actual wrongdoer from responsibility.[15]

The conclusion that a delinquent Government employee is recognized to have normal liability to his employer also derives support from the fact that, as recently as the first session of the 83d Congress, four public bills were introduced [16]

[15] For the view of the Senate Committee on the Judiciary with respect to indemnifying a government employee held liable in a private action, see S. Rep. No. 2025, 82d Cong., 2d Sess., p. 2, *infra*, p. 24, fn. 18.

[16] H. R. 3063 (99 Cong. Rec. 1128); H. R. 3320 (99 Cong. Rec. 1288); H. R. 3698 (99 Cong. Rec. 1663); H. R. 4261 (99

providing that no post office vehicle operator *shall be responsible or liable to the United States* (1) for damage to a motor vehicle in the performance of official duties,[17] or (2) for personal injury or property damage to any person, resulting from the operation of a post office vehicle.[18] Such bills,

---

Cong. Rec. 2361). Each bill was referred to the Committee on the Judiciary, without further action to date. Three bills of like import were introduced in the 82d Cong., 2d Session. They were referred to either the Senate Committee on the Judiciary or House Post Office and Civil Service Committee without further action. S. 2929 (98 Cong. Rec. 2989); H. R. 6669 (98 Cong. Rec. 1105); H. R. 6886 (98 Cong. Rec. 1870).

[17] Cf. 39 C. F. R. § 3.4 (15 F. R. 5692):

"(a) *Determination of responsibility.*—Whenever Government property of any kind is lost or damaged through the carelessness, negligence, willfulness, or malice of a postal employee, the facts shall be reported by the postmaster or district superintendent, Postal Transportation Service, to the proper bureau of the Post Office Department for determination as to whether such postal employee shall be held personally responsible for the value of the property so lost, damaged, or destroyed."

[18] Cf. Pvt. L. 809, 810, 811, 82d Cong., 2d Sess. (66 Stat. A. 138–139). And see Pvt. L. 820, 82d Cong., 2d Sess. (66 Stat. A. 143) which provided for the payment of a sum sufficient to satisfy a judgment in a state court against a postal employee. However, see S. Rep. No. 2025, 82d Cong., 2d Sess., p. 2, anent H. R. 5911 [Pvt. L. 820], which states:

"With respect to the Government employee, in this case a postal carrier, it must be borne in mind that as between the United States and one of its employees the ultimate responsibility for the negligence of the employee rests on the employee's shoulders. *Even when a judgment has been obtained under the Federal Tort Claims Act the United States has a right of action over against the employee.* [Emphasis added.]

"The Federal Government has not, however, followed such

in so far as they seek to eliminate the Government's right of indemnity, are footless if that right is non-existent in the first place.

(iii) *Standard Oil* stressed the connection between the claim there asserted and federal fiscal policy (332 U. S. 301, 314–315), and recognition of the Government's right to contribution and indemnity from persons jointly or primarily liable for the injuries of a third person undoubtedly also bears a relationship to the fiscal affairs of the United States. But the same is true whenever the Government asserts a common law cause of action. Yet, the fiscal aspects of a case have never been held, without more, to be a sufficient basis for denying to the United States the common law rights

---

an extreme policy. Especially in these private claims this committee has recognized that the drivers of Government vehicles are not covered by insurance and do not have an opportunity to obtain such insurance. Consequently each claim is scrutinized on its merits. If in the opinion of the committee there was no negligence on the part of the postal carrier or his negligence was only slight the committee would undertake to relieve him. If on the other hand the postal carrier has exceeded the scope of his employment or has been substantially negligent the committee will not undertake to relieve the postal carrier.

"In this particular instance the committee is of the opinion that the negligence of the postal carrier was only slight and consequently recommends that he be relieved as provided in this bill, H. R. 5911. There is ample precedent for such action in S. 2147, S. 1988, S. 1741, and more recently in S. 1690, all in the Eighty-second Congress."

of a private individual.[19] The emphasis, in the *Standard Oil* opinion, on congressional control over fiscal matters must plainly be taken in its special context of a claim for the creation of a *new* right, unknown to the common law, a right which would be an incident of a uniquely governmental relationship, that of sovereign and soldier. Such is not the case here, and the Court need not defer to Congress.

Even if Congress is held to be the necessary arbiter where fiscal matters are concerned, we submit that the present action for indemnity, as in the case of contribution (*United States* v. *Yellow Cab*, 340 U. S. 543, 551–552) (see *supra*, pp. 18–19; *infra*, pp. 29–30), has been implicitly sanctioned by Congress, in the Tort Claims Act, by waiving the immunity of the United States from suit for tort wrongs, by equating the Government's liability for tortious acts of its agents with that of a private individual, and by remitting particular rights and liabilities to the general law rather than depending upon legislative definition and circumscription (28 U. S. C. 1346 (b), 2674). See *infra*, pp. 27 *ff*.

[19] Cf. *Dugan* v. *United States*, 3 Wheat. 172, 179–180; *United States* v. *Buford*, 3 Pet. 12; *United States* v. *Bank of the Metropolis*, 15 Pet. 377; *Cotton* v. *United States*, 11 How. 229; *McElrath* v. *United States*, 102 U. S. 426, 440–441; *Wisconsin C. R. R. Co.* v. *United States*, 164 U. S. 190; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *United States* v. *Silliman*, 167 F. 2d 607 (C. A. 3), certiorari denied, 335 U. S. 825. See *supra*, pp. 18–20.

B. THE FEDERAL TORT CLAIMS ACT, NEITHER EXPRESSLY NOR BY IMPLICATION, DEPRIVES THE UNITED STATES OF THE RIGHT TO ENFORCE AN EMPLOYER'S COMMON LAW RIGHT OF INDEMNITY

As we have shown above at pp. 11–20, the right of indemnity is a quasi-contractual right which the United States could enforce without any express grant from Congress. Accordingly, had Congress intended to preclude the assertion of such a right, it would have been necessary for it so to have provided in specific terms in the Tort Claims Act. Instead, Congress, although aware that the Act contained no specific provision one way or another concerning the Government's right of indemnity, chose to leave the question for solution in accordance with the rights existing between private parties.

1. *The developing legislative history of the Tort Claims Act discloses a congressional purpose to follow conventional law.*—Tort claims bills introduced in the 76th Congress and continuing through the 79th Congress [20] reveal a continual

[20] H. R. 7236, 76th Cong., 1st Sess. (86 Cong. Rec. 12032); S. 2690, 76th Cong., 1st Sess. (84 Cong. Rec. 7834); H. R. 5299, 77th Cong., 1st Sess. (87 Cong. Rec. 6024); H. R. 5373, 77th Cong., 1st Sess. (87 Cong. Rec. 6234); H. R. 6463, 77th Cong., 2d Sess. (88 Cong. Rec. 691); S. 2207, 77th Cong., 2d Sess. (88 Cong. Rec. 417); S. 2221, 77th Cong., 2d Sess. (88 Cong. Rec. 586), passed Senate, March 30, 1942 (88 Cong. Rec. 3175), reported by House Committee with amendment, H. Rep. No. 2245, 77th Cong., 2d Sess. (88 Cong. Rec. 5274); H. R. 817, 78th Cong., 1st Sess. (89 Cong. Rec. 50); H. R. 1356, 78th Cong., 1st Sess. (98 Cong. Rec. 250);

modification in a direction away from statutory enunciation of particular rights and liabilities, characteristic of earlier proposed enactments (see *Feres* v. *United States,* 340 U. S. 135, 138–139), and toward reliance upon accepted principles of general law to be applied by the courts—once jurisdiction over the particular type of suit has been acquired. See *United States* v. *Yellow Cab Co.,* 340 U. S. 543, 549. The evolution of this legislative purpose, culminating in Title IV of the Legislative Reorganization Act, 60 Stat. 842, resulted in the ultimate excision of specific provisions relating to such matters as the distribution of proceeds in wrongful death actions, contributory negligence, aggravation of damages, and the distribution of benefits where the claimant died pending disposition of his claim. See Hearing Before House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. p. 27.[21] The assimilation of the United States to

S. 1114, 78th Cong., 1st Sess. (89 Cong. Rec. 4500); H. R. 181, 79th Cong., 1st Sess. (91 Cong. Rec. 21); S. 2177, 79th Cong., 2d Sess. (92 Cong. Rec. 4981).

[21] See H. Rep. No. 2245, 77th Cong., 2d Sess., p. 12: "Section 403 of the Senate Bill [S. 2221, 77th Cong., 2d Sess.] provided for proportionate liability of the United States where a Government employee was a joint tort-feasor with someone else. This provision is not contained in the recommended bill and in cases involving joint tort-feasors the rights and liabilities of the United States will be determined by the local law." Compare H. R. 6463, 77th Cong., 2d Sess., Sec. 403, and S. 2221, 77th Cong., 2d Sess., Sec. 403, with H. R. 181, 79th Cong., 1st Sess.

a private individual with respect to the tortious acts of its agents similarly resulted in the ultimate omission from the final Act of a provision pertaining to the contribution rights of the United States where persons were involved, other than government employees, who were jointly responsible for the injury or damages.[22] As the *Yellow Cab* case held (*supra,* pp. 18–19), contribution is nevertheless available to the Government; so is the right of indemnity against others than federal employees (*supra,* pp. 18–19).

By placing the United States in the position of a private employer the necessity for express reservations of the right of indemnity never arises, since such a right implicitly follows from the treatment of the United States as a private employer (cf. *United States* v. *Yellow Cab Co.,* 340 U. S. 543, 550–551, n. 8). The failure of

[22] This particularization of rights and liabilities explains the inclusion, in some earlier bills, of a provision specifically permitting the Government to sue the negligent employee for indemnity. These provisions were included with an express recognition that they merely spelled out the principal's common-law right against his agent.

See e. g., Assistant Attorney Gen. Rugg, appearing at a Hearing Before a Subcommittee of the Committee on Claims, House of Representatives, 72d Cong., 1st Sess., on a General Tort Bill (H. R. 5065), p. 14:

"I think that under the common law the principal has the right of action against the agent for any damages that the agent causes and for which the principal is ultimately responsible. This is not a very important section because, generally speaking, the agents are not financially responsible, so that the right of action is of no genuine value."

Congress, in the present Act, expressly to provide for reimbursement from government employees is in keeping with its reliance upon principles of general law. Until there is an express negation of the right of indemnity, the general law prevails and the present type of action may be maintained.[23]

[23] See *supra*, pp. 23–25, regarding the pendency of legislation limiting the indemnity rights of the United States as to postal vehicle operators.

There is legislative material in the 77th Cong., 2d Sess., which discloses that there was no intention to provide for recourse against the employee where there was involved an *administrative* settlement up to $1,000. See S. Rept. 1196, 77th Cong., 2d Sess., p. 5. And see R. 55, n. 3. In the 77th Cong., 2d Sess., hearings were held on H. R. 5373 and H. R. 6463. In discussing the provisions of the bills which made acceptance of an *administrative* award by a claimant effective as a complete release as to any claim against either the employee or the United States (Sec. 201), Asst. Atty. Gen. Shea testified:

"The CHAIRMAN. Mr. Shea, you are discussing and directing your remarks to the matter where, if a person is injured and files a claim against the Government and the Government satisfied that claim, that is the end of the claim against anybody?

"Mr. SHEA. That is right.

"The CHAIRMAN. What is the arrangement when the Government has an employee who is guilty of gross negligence and injury results? Is there any requirement that that employee should in any way respond to the Government if it has to pay for the injury, in the event of gross negligence?

"Mr. SHEA. Not if he is a Government employee. Under those circumstances, the remedy is to fire the employee.

"Mr. MCLAUGHLIN. No right of *subrogation* is set up?

"Mr. SHEA. Not against the employee." [Emphasis added.] [Hearings on H. R. 5373 and H. R. 6463 Before the Committee on the Judiciary, House of Representatives,

2. *28 U. S. C. 2676 does not destroy the right of the United States to maintain a common law action of indemnity against its negligent employee.*—Section 2676 of the Act, upon which the decision below rests, provides that a judgment in a Tort Claims action "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." This, of course, applies whether the judgment is one dismissing the action or is one entering judgment against the United States. On its face, the Section applies only to actions *by the claimant* and does not prejudice rights of

77th Cong., 2d Sess., pp. 9–10; see also, S. Rep. No. 1196, 77th Cong., 2d Sess., p. 5.]

While this Court has recognized that the shape of the Tort Claims Act was largely determined during its consideration by the 77th Congress, 2d Sess. (*United States* v. *Spelar*, 338 U. S. 217, 219–220; and see *Dalehite* v. *United States*, 346 U. S. 15, 24–30), it has also held that the "views expressed in the earlier legislative history of this particular bill lose force by their omission from the 1946 report and discussion." *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 551. Moreover, it is to be observed (a) that Mr. Shea was discussing an *administrative* settlement where it could well be asserted that the payment was voluntary and hence gave rise to no right of indemnity (see fn. 10, *supra*, p. 18), and (b) that he was answering a specific question concerning *subrogation* for which, unlike indemnity, it would be necessary to make specific statutory provision. Also, consideration was not directed to the situation of insured employees. See fns. 2, 6, and 18, *supra*, pp. 3–4, 11–12, 24.

the United States.[24] The effect of the Section, for the claimant, is to make the judgment, rather than its satisfaction (as in the case of a private employer[25]), a conclusive bar to the claimant's right against the employee.[26]

[24] What is now Section 2676 of 28 U. S. C. appeared in Section 410 (b) of S. 2177, 79th Congress, 2d Session, and ultimately in Section 410 (b) of the Legislative Reorganization Act of 1946. Its purpose was not the subject of explanation in the Committee Report of the Joint Committee on the Reorganization of Congress, 79th Congress, 2d Session, or in S. Rep. No. 1400, 79th Congress, 2d Session, submitted by the Special Committee on the Organization of Congress. Its genesis, however, may be traced to H. R. 5373, introduced in the 77th Congress, 1st Session (87 Cong. Rec. 6234) where it was added by the committee on the Judiciary (Section 301). The Committee comment on the provision was as follows: "Under the present bill, the judgment rendered will constitute a bar to further action upon the same claim not only against the Government but also against the employee whose wrongful conduct gave rise to the claim." See Memorandum for the Use of the Committee on the Judiciary Explanatory of Committee Print of H. R. 5373, 77th Cong., 2d Sess., p. 25.

The provision likewise appeared in H. R. 6463 (88 Cong. Rec. 691) and in the companion bill, S. 2207 (88 Cong. Rec. 417), introduced in the Second Session of the 77th Congress. The implication that Section 2676 was intended to deprive the Government of its right to indemnity (R. 55–56) emanates, not from the language itself, but from the legislative history of the administrative settlement provisions of the tort claims bills considered by the 77th Congress (R. 55, n. 3). See *supra*, p. 30, fn. 23.

[25] *Eberle* v. *Sinclair Prairie Oil Co.*, 120 F. 2d 746 (C. A. 10); *Royal Indemnity Co.* v. *Olmstead*, 193 F. 2d 451 (C. A. 9); Restatement, *Judgments*, § 95; *Lovejoy* v. *Murray*, 3 Wall. 1, 17; cf. *Anderson* v. *Abbott*, 321 U. S. 349, 355; *Sessions* v. *Johnson*, 95 U. S. 347, 349.

[26] Thus, for purposes of an action brought under the Tort Claims Act Congress has adopted the rule that the cause of

The apparent explanation for making the judgment, rather than the satisfaction, conclusive of the claimant's rights lies in the assured solvency of the United States;[27] at the same time, the provision precludes a claimant, perhaps dissatisfied with a court's award, from submitting the same cause of action to a jury in a subsequent proceeding brought against the employee. Cf. Restatement, *Judgments,* § 96 (1) (b).

a. There is no reason to extend Section 2676 beyond its terms to grant a special benefit to the federal employee, a benefit unavailable to a private employee. Whether the judgment itself (under Section 2676) or the satisfaction of the judgment (in the ordinary tort case) be conclusive, in either event the right of action by the injured person against the negligent employee is barred.[28] The benefit to the employee is the same. In the case of the private employee, the fact that the injured party is precluded from proceeding against him does not militate against his private employer's right of indemnity, and the same result should follow where the United States is the employer—unless, perhaps, there be

---

action merges in the judgment. This rule, though never generally accepted in the United States, prevailed in England until 1935 when modified by Section 6 (a) (b) of the Law Reform (Married Women and Tortfeasors) Act, 1935, 25–26 Geo. 5, c. 30. See 13 Halsbury's Laws of England [1934] (2d Ed.), pp. 416–418.

[27] Cf. *United States* v. *Shaw*, 309 U. S. 495; *Federal Housing Administrator* v. *Burr*, 309 U. S. 242.

[28] See footnote 25, *supra*, p. 32.

proof that Congress desired to put the federal employee on a special plane.

Nothing in the terms of the Tort Claims Act nor in the history of tort claims legislation reveals any such purpose. The objectives of the Tort Claims Act were twofold: To extend a judicial remedy against the United States to persons injured or damaged by the tortious conduct of government agents (*Feres* v. *United States,* 340 U. S. 135) and, at the same time, to relieve Congress of the burden of the private bill procedure through which a limited form of relief had theretofore been available (*United States* v. *Yellow Cab Co.,* 340 U. S. 543, 549–550). Nothing discloses that, in providing tort relief, Congress was in any way motivated by an avuncular solicitude towards its employees and intended thereby to confer, directly or indirectly, an immunity from tort liability upon its servants which no employee of a private employer enjoys. The negligent government agent was personally liable for his tortious conduct prior to the Act and remains so today. That a remedy is available against the United States, where the employee was acting within the scope of employment, does not absolve the employee from liability any more than a private employer's liability, under the doctrine of *respondeat superior,* absolves the private employee from tort responsibility.

The specific purpose of Section 2676 — aside from the adoption of the principle of merger of

the cause of action in the judgment (*supra*, fn. 26, p. 32) was to benefit the Government. As explained by Assistant Attorney General Shea when discussing a like provision in the case of an administrative settlement (Hearings on H. R. 5373 and H. R. 6463 before the Committee on the Judiciary, House of Representatives, 77th Cong., 2d Sess., p. 9):

> Mr. SPRINGER. I would like to direct your attention, Mr. Shea, to line 19. Why do you provide this acceptance of the award as constituting a bar to the claim against the employee? Is that the intention of the provision, and what is the ultimate purpose of it?
>
> Mr. SHEA. I gather that that was the question to which the chairman was also directing his attention, and the answer is this: It has been found that the Government, through the Department of Justice, is constantly being called on by the heads of the various agencies to go in and defend, we will say, a person who is driving a mail truck when suit is brought against him for damages or injuries caused while he was operating the truck within the scope of his duties. Allegations of negligence are usually made. It has been found, over long years of experience, that unless the Government is willing to go in and defend such persons the consequence is a very real attack upon the morale of the services. Most of these persons are not in a position to stand or defend large damage suits, and

they are of course not generally in a position to secure the kind of insurance which one would if one were driving for himself.

If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by a judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck. If he could sue the driver of the truck, we would have to go in and defend the driver in the suit brought against him, and there will thus be continued a very substantial burden which the Government has had to bear in conducting the defense of post-office drivers and other Government employees.

b. Insofar as the conclusiveness of the *judgment* in an action under the Tort Act (as distinguished from the *satisfaction*) may be considered an indirect special benefit to the Federal employee, Section 2676 is merely an application of the generally accepted common law principle of *res judicata* or estoppel by judgment which, in the case of a private employer and employee, could result in a comparable benefit to a private employee.[29]

[29] Some confusion seems to exist in this field (cf. *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 129; *McAlevey* v. *Litch*, 234 Mass. 440, 125 N. E. 606; *Myers' Adm'x* v. *Brown*, 250 Ky. 64, 61 S. W. 2d 1052), and Congress may have desired to remove all uncertainty.

Thus, courts exercising common law jurisdiction generally follow the rule that, where liability in an action growing out of an accident is claimed because of the alleged negligence of an agent, a judgment in favor of the principal, upon a ground equally applicable to the agent, is *res judicata* or conclusive as against the injured person's independent right against the agent.[30] In *Giedrewicz* v. *Donovan,* 277 Mass. 563, 179 N. E. 246, a judgment in favor of an employer in an action against him to recover for personal injuries to a pedestrian allegedly caused by the negligent operation of the employer's automobile was held to be a bar to a subsequent action by the injured person against the employee for the same injury. The court said (277 Mass. at 569):

> As a matter of public policy and in the interest of accomplishing justice, the better rule would seem to be that, if it is clearly established, in the trial of an action either against the employee or against the principal for damages caused by the employee's negligent conduct, that the employee is not negligent, the judgment in the case first tried is a bar to a subsequent action by the same plaintiff for the same negligent act

[30] The same result follows where the injured person proceeds solely against the agent. A judgment in favor of the agent is a bar to a subsequent action against the principal who would be liable only under the doctrine of *respondeat superior. King* v. *Stuart Motor Co.*, 52 F. Supp. 727 (N. D. Ga.); *Overstreet* v. *Thomas*, 239 S. W. 2d 939 (Ky.); Restatement, *Judgments*, § 99.

> of the same employee. In principle it would seem to be immaterial whether the first judgment was obtained in an action against the employer provided the only ground for holding the employer is the negligence of the employee and it clearly appears that in the first trial the employee was found to be free from culpability.

And in *Jones* v. *Young,* 257 App. Div. 563, 14 N. Y. S. 2d 84, where the plaintiff, who had sustained injuries as a result of the alleged negligence of a state employee, had had his day in the Court of Claims in an action against the State under the New York Court of Claims Act, on the issue of his contributory negligence and of the negligence of the state's employee, it was held that he was not entitled to an opportunity to try the same question in a subsequent action against the employee. See also *Emery* v. *Fowler,* 39 Me. 326; *Barrabee* v. *Crescenta Mut. Water Co.,* 88 C. A. 2d 192, 198 P. 2d 558 (Cal.); *Spitz* v. *BeMac Transport Co.,* 334 Ill. App. 508, 79 N. E. 2d 859; *Silva* v. *Brown,* 319 Mass. 466, 66 N. E. 2d 349; *Jones* v. *Valisi,* 111 Vt. 481, 18 A. 2d 179. Cf. *Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111, 127–128. 1 Freeman, *Judgments,* 5th Ed., § 469; Restatement, *Judgments,* §§ 96, 99.[31]

[31] The rule exemplified by these cases, generally considered as an exception to the principle of *res judicata* by reason of diverse parties in the subsequent action and a lack of mutuality, is not confined to the master-servant relationship but finds further application wherever, without fault, one person

c. Accepting the view that the action for indemnity was based on the quasi-contractual theory that the employers' satisfaction of a judgment based on the tortious conduct of its employee confers a benefit on the employee for which the employer should receive restitution, the court below held that 28 U. S. C. 2676 had the effect of extinguishing the benefit and thereby precluding the right of restitution. It argued that since, under the statutory provision, the entry of judgment against the Government terminated the responsibility of the employee for his own negligence, payment of the judgment no longer conferred a benefit on the employee, the employee was not unjustly enriched, and the Government was accordingly not entitled to restitution.

This argument is fallacious. The employee is subject to suit by the injured person at any time up to the entry of judgment against the Government, and therefore the very fact that the judgment extinguishes this liability confers a decided benefit upon the employee, amounting to unjust enrichment for which he can be held accountable. The initial source of this benefit was the assumption of liability by the United States under the

---

is made responsible for the tort of another. See e. g. *Washington Gas Co.* v. *District of Columbia*, 161 U. S. 316, and cases cited, *supra*, p. 15; *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 128; *Adriaanse* v. *United States*, 184 F. 2d 968 (C. A. 2), certiorari denied, 340 U. S. 932; *Bruszewski* v. *United States*, 181 F. 2d 419 (C. A. 3). See also, Restatement, *Judgments*, § 96, comment b.

Tort Claims Act, and it is therefore attributable to the United States. Cf. *Terminal R. Assn.* v. *United States,* 182 F. 2d 149 (C. A. 8).

The court below disclaimed any suggestion that its decision was based on the theory that liability for indemnity does not arise until *payment* of the judgment against the Government (cf. Restatement, *Restitution,* §§ 77 (1), 86 comment b; *Dunn* v. *Uvalde Asphalt Paving Co.,* 175 N. Y. 214, 67 N. E. 439) and that at the time of payment the employee is not enriched because his liability has been previously extinguished by the entry of judgment (see R. 55, n. 2). Moreover, such a theory is contrary to generally accepted principles of the law of restitution. Restatement, *Restitution* § 78, comment c, states the law as follows:

> A person who has become secondarily liable upon a transaction * * * because of the fault of another is entitled to restitution from the other if he performs a duty owed by him to the creditor [i. e., the injured person], even though before such performance the duty of the other has terminated. * * *

This principle is illustrated by the rule that the employer may recover indemnity from the employee even though at the time of the employer's payment an action by the injured claimant against the employee was barred by limitations. Cf. *Reed* v. *Humphrey,* 69 Kan. 155, 76 Pac. 390;

Godfrey v. *Rice,* 59 Me. 308, 310; *Sibley* v. *McAllaster,* 8 N. H. 389. Likewise, the employer is entitled to indemnity even though the injured claimant's action against the employee is barred because the employee and the injured claimant are husband and wife. See e. g., *Schubert* v. *Schubert Wagon Co.,* 249 N. Y. 253, 257, 164 N. E. 42, 43; *Hudson* v. *Gas Consumers' Assn.,* 123 N. J. L. 252, 254, 8 A. 2d 337, 339. So here, the United States is not precluded from seeking indemnity, after payment of the judgment, merely because the prior entry of the judgment has absolved the employee from liability to the claimant.

We submit that Section 2676 effects no material change in the substantive rights of a claimant or of the liabilities of an employee which justifies an inference that Congress intended, by the Tort Claims Act, to deny to the United States the employer's traditional right of indemnity.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment should be reversed.

ROBERT L. STERN,
Acting Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
PAUL A. SWEENEY,
JOHN G. LAUGHLIN,
Attorneys.

FEBRUARY 1954.

U. S. GOVERNMENT PRINTING OFFICE: 1954

BLEED THROUGH

BLURRED COPY

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1953
No. 449

UNITED STATES OF AMERICA,

Petitioner,

vs.

MEAD GILMAN, JR.,

Respondent.

Brief of Respondent Mead Gilman, Jr., in Opposition to Petition for Writ of Certiorari.

NO REASON EXISTS FOR GRANTING THE WRIT.

The Decision of the Court of Appeal Is in Accordance With Congressional Intent as Demonstrated by the Statute.

Prior to the enactment of the Federal Tort Claims Act the United States had no right of indemnification from a negligent employee, since the United States was not itself liable. When the Tort Claims Act was enacted Section 2676 of Title 28, U. S. C., provided:

> "The judgment in an action under Section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

Section 2672 of the same title, with respect to administrative settlements under the Act with a claim of $1000 or less, provides that:

> "The acceptance by the claimant of any such award, compromise or settlement, shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim by reason of the same subject matter."

Senate Report 1196, 77th Cong., 2d Sess., p. 5, dealing with the corresponding provisions of what is now Section 2672 of Title 28 *(supra)*, contains the following statement:

> " 'It is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone within limits, leaving the employee at fault to be dealt with under the usual disciplinary controls.' "

The learned Court of Appeals in commenting upon this report states as follows, in footnote 3 of its decision:

> "This report was made in 1942. While in footnote 8 to United States v. Yellow Cab Co., *supra*, some question is raised as to the force of the 1942 legislative history in construing a 1946 Act, yet Dalehite v. United States, 346 U. S. 15, 73 S. Ct. 956, makes it plain that Congress, in passing the Act in 1946, relied upon the 1942 reports and testimony, and the Court there quotes extensively from them including the testimony of then Assistant Attorney General Shea. At that time Mr. Shea testified: 'If the Government has satisfied a claim which is made on account of collision between a truck

carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by a judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck. * * * The Chairman. Mr. Shea, you are discussing and directing your remarks to the matter where, if a person is injured and files a claim against the Government and the Government satisfies that claim, that is the end of the claim against anybody? Mr. Shea. That is right. The Chairman. What is the arrangement when the Government has an employee who is guilty of gross negligence and injury results? Is there any requirement that that employee should in any way respond to the Government if it has to pay for the injury in the event of gross negligence? Mr. Shea. Not if he is a Government employee. Under those circumstances, the remedy is to fire the employee. Mr. Laughlin. No right of subrogation is set up? Mr. Shea. Not against the employee.' (Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2nd Sess., on H. R. 5373 and 6463, pp. 9, 10.)"

The Government's Petition at page 12, footnote 6, concedes that:

"In testifying in the House committee on this aspect of the bill in the 77th Congress, a representative of the Department of Justice suggested that, in his view, the Government would have no right of indemnity and would be left to its remedy of firing the negligent employee or taking other disciplinary action. See Hearings, *supra*, at p. 10. This suggestion also appeared in S. Rept. No. 1196, 77th Cong., 2d Sess., p. 5. However, this testimony was

> given without reference to the situation of insured employees (see fn. 3, *supra*, pp. 6-7) and was not rested on any prohibition or provision in the Act."

It therefore must be apparent that when the Tort Claims Act was enacted Congress in subjecting the Government to a liability which it had never before had, did not have the slightest intention of allowing the Government to seek recompense from the employee.

The question of whether any certain employee might or might not carry insurance or any policy on the part of the Government of seeking indemnity only from insured employees as intimated at page 6 of the Government's Petition, footnote 3, would be immaterial. Congress never intended that the employee would have to respond to the Government. If Congressional intent were ignored the employee would be forced to carry insurance based upon premiums large enough to cover verdicts rendered against such a prime target as the United States Government. If Congress had intended such a burden upon the employee it would have specifically so provided in the Act for indemnification instead of placing in the Act a provision discharging the employee from any liability when judgment was entered against the Government.

The Court of Appeals found it unnecessary to determine whether the rationale of *United States v. Standard Oil Co.*, 332 U. S. 301, would be applicable herein. There the Government was refused indemnification for hospital expenses and loss of services resulting because of defendant's negligent injury to a soldier. Under the state law a right of action would have accrued to a master for similar injuries to a servant. The court refused to concede

such right to the Government, stating among other things, that the subject concerned the "purse strings" of the Government and Congress could have taken positive steps to declare its wishes. Such is the case here.

When the State of California by Section 400 of the Vehicle Code waived its sovereign immunity from claims resulting from negligent operation of vehicles by State employees, specific provision was made for subrogation of the State against the employee as follows:

> "The state * * * is responsible to every person who sustains any damage by reason of death, or injury to person or property as the result of the negligent operation of any said motor vehicle by an officer, agent or employee * * * when acting within the scope of his office, agency or employment; and such person may sue the state * * * in any court of competent jurisdiction in this state in the manner directed by law * * *. In every case where recovery is had under the provisions of this section against the state * * * then the state * * * shall be subrogated to all of the rights of the person injured, against the officer, agent or employee, as the case may be, and may recover from such officer, agent or employee, the total amount of any judgment and cost recovered against the state * * * together with costs therein."

Had the Congress of the United States intended to claim such a right, the Tort Claims Act would also have so provided.

Nothing decided in *United States v. Yellow Cab Company*, 340 U. S. 543, wherein it was held that the Tort Claims Act waived the Government's sovereign immunity to the extent of permitting a joint tort feasor to implead

the United States as a third party defendant for the purpose of recovering contribution from it, remotely bears on the present issue. In that case there was no issue concerning the right of the Government to recover from its employees damages for liability resulting under the Tort Claims Act. Any reference therein contained to that subject matter was pure dicta set forth without benefit of detailed analysis of legislative intent and in connection with a situation not involving any possible application of Section 2676 of Title 28, which acts as a discharge of an employee when a judgment is rendered against the Government.

The Decision of the Court of Appeals Is a Sound Declaration of Proper Law.

The Government concedes that its cause of action is quasi-contractual and based upon the doctrine of unjust enrichment (Pet. p. 16) and in its brief to the Court of Appeals (p. 7) states:

> "The action for indemnity is quasi-contractual in theory, its rationale being that the defendant is unjustly enriched by the plaintiff's payment of the injured party's claim. (Citations.)"

The provisions of Section 2676 that a judgment against the Government constitutes a "complete bar" to any action by the claimant against the employee must be read in connection with Section 2672 of the same Title dealing with administrative settlements of claims under the Act and providing that settlement of a claim of $1000 or less

"shall constitute a complete release of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim * * *." It therefore follows that these provisions of the Tort Claims Act read together lead to the inescapable conclusion that Congress intended a judgment against the Government or an administrative settlement as provided in the Act to release and discharge the employee from all liability. Thus when judgment is rendered against the United States the employee's primary liability is gone. Any liability is discharged and disappears and there is no foundation for the Government to claim unjust enrichment, for Congress has provided otherwise. At the time of the judgment the primary liability of the employee is wiped out and there is only one liability, that of the Government.

Petitioner, at page 14 of its brief, has failed to set forth fully comment "c" of Restatement, *Restitution, Section 78,* as it may apply to the case at bar, and we set it forth herein:

> "A person who has become secondarily liable under a transaction * * * because of the fault of another is entitled to restitution from the other if he performs a duty owed by him to the creditor (*i.e.*, the injured person), even though before such performance the duty of the other has terminated. The duty of reimbursement arises from the payment even if the payor kept alive the duty against himself by making promises to pay, obtaining extensions or changing the state of his residence."

This rule has been followed in cases cited by petitioner at page 15 of its brief wherein indemnity is allowed the employer after the statute of limitations has run in favor of the employee against a third party. The recovery is allowed by reasoning that the primary debt of the employee still exists although unenforceable by the third party because of the statute of limitations. This would not prevent the employer, who was secondarily liable and has satisfied his obligation, from recouping from the one primarily liable if, under the peculiar factual situation, the statute of limitations does not bar such action. Such reasoning can have no application to the present case because by the obvious intent of the statutory enactment the judgment against the Government is a discharge of the employee in recognition of the financial solvency of the United States, and neither a primary liability nor any liability on the part of the employee thereafter exists.

The other cases referred to at page 15 of petitioner's brief allow the employer to seek indemnification from his employee for damages resulting to the employer by virtue of injuries inflicted by the employee on his own wife in the course of his employment. Such recovery is allowed, although the wife could not have sued her husband directly. But here again we are not dealing with a statutory discharge but with a "common-law immunity" of the husband from suit by the wife. The wrong of the husband to the wife has never been discharged but simply may not be the subject of action because as a matter of public policy this would promote family discord. The

primary liability of the husband still exists and if the employer is required to respond in damages based on his secondary liability, the courts have allowed him to recover from the employee. Such a recovery would not be possible had the State Legislature provided in effect, as in the case at bar, that any recovery against the employer discharged the employee.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

PARKER, STANBURY, REESE & MCGEE,
WM. C. WETHERBEE,
ROLLAND LEE NUTT,
Attorneys for Respondent.

IN THE

Supreme Court of the United States

October Term, 1953
No. 449.

UNITED STATES OF AMERICA,

Petitioner,

vs.

MEAD GILMAN, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT MEAD GILMAN, JR.

PARKER, STANBURY, REESE & MCGEE,
WM. C. WETHERBEE,
PAUL J. SEDGWICK,
707 South Hill Street,
Los Angeles 14, California,
Attorneys for Respondent, Mead Gilman, Jr.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

BLEED THROUGH

BLURRED COPY

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES

MISCELLANEOUS

STATUTES

TEXTBOOKS PAGE

BLEED THROUGH

BLURRED COPY

IN THE

Supreme Court of the United States

October Term, 1953

No. 449.

UNITED STATES OF AMERICA,

Petitioner,

vs.

MEAD GILMAN, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT MEAD GILMAN, JR.

Question Presented.

The only question presented is whether the United States has a right to indemnity from an employee whose negligence imposes liability upon the United States by virtue of the Federal Tort Claims Act.

Statutes Involved.

The pertinent portions of the Act read as follows:

Title 28 U. S. C. A., Sec. 1346:

"Sec. 1346. *United States as Defendant.*

* * * * * * * *

"(b) Subject to the provisions of Chapter 171 of this title, the district courts, together with the

District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945 for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Title 28 U. S. C. A.:

"Sec. 2672. *Administrative Adjustment of Claims of $1,000 or Less.*

"The head of each federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

"Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award or determination shall be final and

conclusive on all officers of the government, except when procured by means of fraud.

"Any award made pursuant to this section, and any award, compromise, or settlement made by the Attorney General pursuant to section 2677 of this title, shall be paid by the head of the federal agency concerned out of such agency's appropriations therefor, which appropriations are hereby authorized.

"The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim by reason of the same subject matter."

Title 28 U. S. C. A.:

"Sec. 2674. *Liability of United States.*

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

Title 28 U. S. C. A.:

"Sec. 2676. *Judgment as Bar.*

"Judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

Statement.

Darnell was injured by the negligence of the respondent, Mead Gilman, Jr., an employee of the United States, while driving his employer's automobile. Darnell sued the government under the Federal Tort Claims Act and the government filed a third party complaint for indemnification against respondent, Gilman. The District Court awarded $5500 to Darnell against the United States, and on the third party complaint gave judgment in like amount for the United States against the respondent.

Darnell appealed, contending (1) that it was the intention of Congress that responsibility for negligent acts of employees of the United States be assumed by the government alone. In support of this contention, respondent cited 28 U. S. C. A. 2d 2676 of the Federal Tort Claims Act, providing that a judgment against the government should constitute a bar to any further action by claimant against the employee of the government and setting forth other indicia of such statutory intent; and (2) that within the realm of government fiscal policy the courts will not grant the United States a right of recovery where Congress in legislating upon the subject has withheld such right. As indicative of the judicial position, respondent cited *United States v. Standard Oil Co.*, 332 U. S. 301,

wherein the government in a common law action for indemnity was denied recovery for loss of the services of a soldier injured by the negligent act of a third party in the absence of a statute bestowing this right.

The Court of Appeals reversed the lower court without the necessity of determining whether Section 2676 of the Tort Claims Act directly released the government's claim against its employee, stating:

> "It is thus apparent that we do not deal with any question as to whether Section 2676 releases the government's claim against its employee."
> 260 F. 2d 846, 848.

The court also held that it was unnecessary to determine whether the action was barred by the rule of the *Standard Oil* case.

The court did hold that since the action of the government was quasi-contractual in nature by way of indemnity for payment of that which the employee should have paid, no cause of action ever arose in favor of the government, since by virtue of Section 2676 of the Federal Tort Claims Act the moment judgment was entered against the government the employee was no longer primarily answerable to the claimant nor was he answerable at all, and could not be unjustly enriched by any payment to the injured party.

Judge Harrison, in dissenting from the opinion of the majority, relied upon *U. S. v. Yellow Cab Co.*, 340 U. S. 543, holding the government entitled generally to contribution from joint tort feasors. This latter decision did not have before it, nor had it considered, the problem of a joint tort feasor who is an employee of the government and the problems therein arising under 2676 of

the Federal Tort Claims Act. Further, the dissenting opinion was apprehensive of collusion by employees of the government against the government to advance claims of parties whom the employees have injured. This opinion failed to mention the restraining influence of the laws of perjury and the disciplinary power of departmental heads, as well as the desire of an employee to maintain his record with his employer, and his natural desire to justify his own conduct.

The Decision of the Court of Appeals Was Proper.

The judgment of the Court of Appeals should be affirmed for the following reasons:

I. CONGRESS DID NOT INTEND THAT THE UNITED STATES SHOULD BE INDEMNIFIED FROM A GOVERNMENT EMPLOYEE FOR WHOSE NEGLIGENCE THE GOVERNMENT BECOMES LIABLE UNDER THE TORT CLAIMS ACT.

A. *LEGISLATIVE HISTORY SUPPORTS THE DECISION OF THE COURT OF APPEALS.*

B. *SOUND PRINCIPLES OF JUDICIAL CONSTRUCTION SUPPORT THE DECISION OF THE COURT OF APPEALS.*

II. SECTION 2676 OF THE ACT PREVENTS A CAUSE OF ACTION FOR INDEMNIFICATION FROM ARISING IN THE GOVERNMENT'S FAVOR AGAINST AN EMPLOYEE.

A. *BY RELEASING THE EMPLOYEE UPON JUDGMENT AGAINST THE GOVERNMENT RATHER THAN UPON SATISFACTION THEREOF, THE UNITED STATES BECAME A VOLUNTEER WHO OFFICIOUSLY CONFERRED A BENEFIT UPON THE EMPLOYEE AND IS THEREFORE NOT ENTITLED TO RESTITUTION.*

B. *UPON RENDITION OF JUDGMENT AGAINST THE UNITED STATES THE EMPLOYEE BY OPERATION OF LAW HAS BEEN DISCHARGED FROM OBLIGATION TO ANYONE AND THERE REMAINS NO QUASI CONTRACTUAL BASIS FOR INDEMNITY.*

C. *THE GOVERNMENT, BY STATUTE, HAS PLACED ITSELF IN A POSITION DIFFERENT FROM THAT OF A PRIVATE EMPLOYER AND CONTRARY TO THE PRINCIPLES OF QUASI CONTRACT.*

ARGUMENT.

I.

Congress Did Not Intend That the United States Should Be Indemnified From a Government Employee for Whose Negligence the Government Becomes Liable Under the Tort Claims Act.

A. Legislative History Supports the Decision of the Court of Appeals.

Prior to the enactment of the Federal Tort Claims Act the government was immune from suit by injured claimants. Any restitution resulted from relief afforded through private bills, which, it is conceded, partook of a legislative gratuity founded on a moral obligation not creating any right of restitution from the employee. (Footnote 10, p. 18, App. Br; Restatement, Restitution, Sec. 112.) It was the alarming increase in private bills which brought about enactment of the Tort Claims Act. Thus, historically, there is no foundation in fact or law for assuming that Congress ever intended to recoup in any manner from the employees. In fact, quite the contrary. On many occasions, in deserving cases, Congress actually passed bills to meet the obligations of an employee who was rendered liable to a third party by virtue of the former's use of government property. The attitude of the government was decidedly benevolent in nature and there is every indication that the legislators intended to continue such a policy when the Federal Tort Claims Act was enacted.

Even after passage of the Tort Claims Act, private bill No. 820, 82nd Congress, afforded such special relief to a mail truck operator who had been held liable to a

third party for negligence while acting within the course and scope of his employment by the United States.

In 1941 prior to the passage of the Act, an opinion of the Attorney General directed to the Secretary of Agriculture disclaimed any right to indemnity on behalf of the United States. From the opinion, in 40 Ops. Atty. Gen. p. 38 (1941) we set forth the last three paragraphs expressing the general attitude taken by the government, to the effect that the government does not assume any right to reimburse itself from an erring employee, and would resort merely to disciplinary action:

> "Numerous suits were filed by officers and employees of the Government and the judgments obtained were sometimes in amounts so large as to threaten financial ruin and bankruptcy. Notwithstanding the view stated by the Solicitor in Dennis v. United States, the Congress repeatedly came to the relief of the erring officers and employees. Thus, in Murray v. Schooner Charming Betsy, 2 Cranch 64, 124. The Supreme Court held Captain Murray of the U. S. Frigate Constitution personally liable for a tortious seizure, but the Congress made provision for his relief by the Act of January 31, 1805, see 12 Six Stst. 56. Some of the suits were undoubtedly prosecuted in anticipation of such action by the Congress. In other cases private acts appropriated money for the direct relief of the injured private persons.
>
> "Since that time the Congress has by general legislation progressively assumed liability to persons sustaining injury through negligence of officers and employees of the Government and in doing so has not made provisions for the assertions of claims by the United States against the officers and employees

causing the damage. A comprehensive review of the course of such legislation (including private acts) in collision cases appears in the Government's brief on reargument in Boston Sand & Gravel Company v. United States (No. 15, Oct. Term 1928) 278 U. S. 41.

"For the foregoing reasons it is my opinion that there is no authority in the Secretary of Agriculture to require an employee to reimburse the Government for a payment made in settlement of a claim under the Act of December 28, 1922. Of course, the employee may be subject to suitable disciplinary action, including dismissal, if warranted."

Section 2672 of 28 U. S. C. A., with respect to administrative settlements under the Act with a claim of $1000 or less, provides that:

"The acceptance by the claimant of any such award, compromise or settlement, shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim by reason of the same subject matter."

Senate Report 1196, 77th Cong., 2d Sess., p. 5, dealing with the corresponding provisions of what is now Section 2672 of Title 28, *supra,* contains the following statement:

" 'It is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone within limits, leaving the employee at fault to be dealt with under the usual disciplinary controls.' "

This report was made in 1942, but *Dalehite v. United States,* 346 U. S. 15, makes it plain that Congress in passing the Federal Tort Claims Act in 1946 relied upon the 1942 reports and testimony, and the court in this latter case quotes extensively from them. Reference is herein made to the testimony of the then Assistant Attorney Shea:

> "The Chairman. Mr. Shea, you are discussing and directing your remarks to the matter where, if a person is injured and files a claim against the Government and the Government satisfied that claim, that is the end of the claim against anybody?
>
> "Mr. Shea. That is right.
>
> "The Chairman. What is the arrangement when the Government has an employee who is guilty of gross negligence and injury results? Is there any requirement that that employee should in any way respond to the Government if it has to pay for the injury, in the event of gross negligence?
>
> "Mr. Shea. Not if he is a Government employee. Under those circumstances, the remedy is to fire the employee.
>
> "Mr. McLaughlin. No right of *subrogation* is set up?
>
> "Mr. Shea. Not against the employee." (Emphasis added.) (Hearings on H. R. 5373 and H. R. 6463 Before the Committee on the Judiciary, House of Representatives, 77th Cong., 2d Sess., pp. 9-10; see also, S. Rep. No. 1196, 77th Cong., 2d Sess., p. 5.)

This court has recognized that the shape of the Tort Claims Act was largely determined during its consideration by the 77th Congress, Second Session, (*Dalehite v. United States,* 346 U. S. 15, 24-30).

In testifying before the House Committee on this very aspect of the bill in the 77th Congress, a representative of the Department of Justice suggested that, in his view, the government would have no right to indemnity and would be left to its remedy of firing the negligent employee or taking other disciplinary action. (Hearings before House Committee on Judiciary on H. R. 5373 and 6463, 77th Cong., 2d Sess., p. 10.)

Irving Gottlieb, Attorney, Tort Claim Section, Department of Justice, discussed the Government's right to indemnity under the Act in an article appearing in 9 Fed. Bar Journal 391, in the following language.

> "It should be pointed out that in one of the early and well established fields where indemnity has been historically operative, that is, in the master-servant relationship, Federal Tort Claims Act in its legislative history contemplates no action by the United States against its delinquent employees, other than disciplinary proceedings. Section 410(b) of the Act provides for a clear assumption of liability on the part of the United States for the delicts of its agents acting within the scope of their authority. Notwithstanding the foregoing, the Statute on its face being silent on the rights of the United States over against its employees and there being no prohibition of the common law right inherent in the master-servant relationship, the possibility of action over by the United States, where the situation is one calling for more than mere disciplinary action still remains."

Mr. Gottlieb reviews the legislative debates made prior to the passage of the Act when private bills were being passed to relieve the employee from liability and concludes that the debates contemplated no right to indemnity

in favor of the United States. Mr. Gottlieb also found that these same debates and the reasoning therefor were adopted by Congress when the Act was passed. That is, the Government was content to have the right to take appropriate disciplinary action against its employee and did not undertake to outline governmental fiscal policies.

The government is unable to point out any reports or testimony before Committees of Congress prior to enactment of the Tort Claims Act wherein there was evidenced any intention or opinion that expenses incurred by the government under the Act should be recouped from employees. As above set forth in this brief, all of the intentions and expressions were to the contrary. This should give compelling force to the position of the respondent in this case.

Under Section 2672, Title 28 U. S. C. A., dealing with administrative adjustments of claims which is a subsestantial and integral portion of the statute, the intention of Congress was to confer a benefit upon the employee and not to employ legal sanctions through the courts. The same reasoning is applicable to Section 2676 of the Act making a judgment against the United States a complete bar to any action against the employee.

Appellant's brief, at page 32, recognizes that in the case of a private employer and employee it is the *satisfaction,* rather than the *rendition,* of the judgment against the employer that absolves the employee from further liability to the third party. (Citing: *Eberle v. Sinclair Prairie Oil Co.,* 120 F. 2d 746 (C. A. 10); *Royal Indemnity Co. v. Olmstead,* 193 F. 2d 451 (C. A. 9); Restatement, *Judgments,* Sec. 95; *Lovejoy v. Murrary,* 3 Wall. 1, 17; *Cf. Anderson v. Abbott,* 321 U. S. 349, 355; *Sessions v. Johnson,* 95 U. S. 347, 349.)

Here the legislative body has conferred the benefit by releasing the employee immediately upon entry of the judgment without reference to satisfaction as would otherwise be the case. (*McVeigh v. McGurren,* 117 F. 2d 672; *Bigelow v. Old Dominion Copper Co.,* 225 U. S. 111, 129; Restatement, *Judgments* 96 (2); 1 Freeman, *Judgments,* 469, p. 1032.)

At common law where liability is claimed arising out of an accident caused by alleged negligence of an agent, a judgment *in favor of* the principal is *res judicata* or conclusive as to further action against the agent (App. Br. p. 37). Thus, where judgment favors the government, Section 2676 grants no benefit not existing under the common law. But the Act does confer a benefit when judgment is in favor of the third party against the government, and does so by releasing the employee upon rendition of judgment instead of requiring actual satisfaction as would otherwise be the case.

Therefore, it is all the more apparent that it was in a case such as the one at bar where judgment is rendered against the government that Congress intended to protect the employee. All of the above demonstrates an obvious intention on the part of Congress to benefit the employee, and nowhere is there anything that would justify an inference that Congress meant this Act to be used against the employee whom it was trying to protect.

Respondent's position is particularly cogent if we accept the argument of petitioner at page 35 of its brief wherein Mr. Shea, in the Committee hearing prior to enactment of the statute, expresses the desire of the government to maintain the morale of the government employees who are involved in litigation.

If the government is willing to go out of its way to supply legal counsel to every individual government employee who gets involved in an accident using government property solely to keep up the morale of the employees, it must go without saying that Congress, knowing of this through Mr. Shea, intended to boost the morale of the employees by barring further action against them by anyone when a judgment was entered against the government. Congress enacted Section 2676 to protect the employees. It certainly never intended that the Act should be regarded as enabling authority to prosecute government employees that Congress had previously, in deserving cases, seen fit to reimburse. It is particularly ironic that this very section barring suits against the employee upon entry of judgment against the United States is now being used by the government to prosecute an action for indemnification immediately upon entry of the judgment, whereas, even a private employer who has demonstrated no interest in protecting his employee could not seek indemnity until actual satisfaction of the judgment had been made.

In this connection it must be pointed out that if the morale of government employees is to be considered as a basis for the decision in this case, the government's position here must fall, for if the employee is not insured and the government is allowed to press this action for indemnity, the effect on the employee's finances would seriously impair his morale. Whereas, if the government pursues this course of action in such a manner as to require the employee to become insured in contradiction to the true purpose of the Act, a penalty is inflicted upon the government employee who must assume the cost of premiums as a burden to his employment. The additional

cost to the employee must necessarily have a corresponding adverse influence upon his morale. Thus the interpretation demanded by the government contravenes the purpose of Congress in conferring benefits upon the employees.

B. Sound Principles of Judicial Construction Support the Decision of the Court of Appeals.

In *United States v. Standard Oil Company,* 332 U. S. 301, a soldier was injured by the negligence of defendant's driver. The United States bore the expenses of hospitalization and his army pay during his disability. Suit was brought by the United States to recover its expenditures. Ordinarily under state law a right of action would have accrued to a master for similar injuries to a servant. This court refused to concede such right to the government, stating, among other things, that the subject concerned the "purse strings" of the government and that Congress, had it so desired, could have taken positive steps to declare its wishes on a matter so intimately affecting fiscal affairs of the government. Admittedly, there were other grounds, which petitioner has mentioned in its brief, for the court reaching the decision it did, but there is a similarity between the *Standard Oil* case and the one at bar as they affect fiscal policy of the government which justifies application of the same rationale to the present case.

In this connection Congress, in enacting the Federal Workmen's Compensation Act, U. S. C. Title 5, Section 776, specifically provided that the United States is subrogated to any rights its employees may have against third parties responsible for expenses of the United States under the Act.

Similarly, it should be noted that when the State of California by Section 400 of the Vehicle Code waived its sovereign immunity from claims resulting from negligent operation of vehicles by State employees, specific provision was made for subrogation of the State against the employee as follows:

> "The state * * * is responsible to every person who sustains any damage by reason of death, or injury to person or property as the result of the negligent operation of any said motor vehicle by an officer, agent or employee * * * when acting within the scope of his office, agency or employment; and such person may sue the state * * * in any court of competent jurisdiction in this state in the manner directed by law * * *. In every case where recovery is had under the provisions of this section against the state * * * then the state * * * shall be subrogated to all of the rights of the person injured, against the officer, agent or employee, as the case may be, and may recover from such officer, agent or employee, the total amount of any judgment and costs recovered against the state * * * together with costs therein."

It is only reasonable to assume and decide that had Congress wished to have the close relationship between the government and its employees disturbed by litigation between them, then certainly a specific provision for such drastic action would have been contained in the enactment. This is particularly so, in view of the benevolent attitude of the government towards its employees prior to this statute.

II.

Section 2676 of the Act Prevents a Cause of Action for Indemnification From Arising in the Government's Favor Against an Employee.

Since the government is totally lacking in statutory authority to proceed against the employee for indemnification, it pleads that it has a right to be treated as an ordinary private employer under the quasi contractual theory of common law. At pages 12-13 of its brief it states:

> "The court of appeals correctly concluded that federal and not state law controlled, that the action of indemnity was quasi contractual in theory, and that it was based upon the concept of unjust enrichment resulting from the benefit conferred upon the employee by the employer's discharge of an obligation which, in equity and good conscience the employee, the one who was actually guilty of the negligence, ought to have paid. * * * In seeking restitution from its agent, the United States asks only for nondiscriminatory application to it, as an employer, of the historic rule of the common law which recognizes the employer's rights over against the employee."

The government also concedes that in the case of a private employer, the employee is released only upon satisfaction of the judgment against his employer, whereas Section 2676 of the Tort Claims Act releases the employee upon rendition of the judgment rather than upon its satisfaction. At page 32 of its brief the government states:

> "The effect of the Section, for the claimant, is to make the judgment, rather than its satisfaction (as in the case of a private employer), a conclusive bar to the claimant's right against the employee."

Therefore, by its own admission, the government's case must stand or fall on its ability to qualify for indemnity under the rules of quasi contract applicable to a private employer. Its case falls for the following reasons:

A. By Releasing the Employee Upon Judgment Against the Government Rather Than Upon Satisfaction Thereof, the United States Became a Volunteer Who Officiously Conferred a Benefit Upon the Employee and Is Therefore Not Entitled to Restitution.

The cases are legion which hold that one who without mistake, coercion or request satisfies another's obligation is not entitled to restitution from the other. (Restatement, Restitution, Sections 2, 112-117; *Homestead Company v. Valley Railroad,* 84 U. S. 153; *Thompson v Deal,* 92 F. 2d 478.) At page 39 of its brief the government admits that Section 2676 confers a benefit upon the employee by extinguishing his liability upon rendition of judgment, whereas otherwise he would have to await satisfaction thereof and pending satisfaction could be subjected to a harassing suit by the same claimant.

Therefore, under 2676, the government without mistake, coercion or request has advanced the benefit to the employee of satisfying the claim against him upon rendition of judgment against the government rather than by later satisfaction thereof. By this benefit advanced the government has placed itself in the position of a volunteer under the common law and has no right to indemnity.

B. Upon Rendition of Judgment Against the United States the Employee by Operation of Law Has Been Discharged From Obligation to Anyone and There Remains No Quasi Contractual Basis for Indemnity.

> "A quasi contractual obligation is one that is created by the law for reasons of justice without any expression of assent and sometimes even against a clear expression of dissent. * * * It must be admitted, or indeed asserted, that considerations of equity and morality play a large part in the process of finding an inference of fact as well as constructing a quasi contract without any such inference at all. *The exact terms of the promise that is 'implied' must frequently be determined by what equity and morality appear to require after the parties have come into conflict.*" (Emphasis ours.)
>
> *1 Corbin on Contracts,* Sec. 19 (1950).

A review of legislative history and of Congressional thinking prior to and even after enactment of the Tort Claims Act clearly demonstrates that Congress, upon submitting the United States to liability under the Act, contemplated no indemnification of the government by its employees. The Act maintains a silence on the subject except to grant the employee a benefit under Section 2676, which, in the absence of a specific statutory declaration to the contrary, is inconsistent with any action by the government against its employee for indemnity. The wording of the statute leads to but one conclusion, namely, that Congress intended to confer all benefits reasonably inferrable from the language used.

Applying the considerations of equity and morality which govern the creation of quasi contractual obligations the effect of 2676 is to protect the employee. The third party in voluntarily causing a judgment to be en-

tered in his suit against the United States has released and discharged the employee's obligation to him by operation of law in such manner that no implied promise of the employee to indemnify the government comes into being.

C. The Government, by Statute, Has Placed Itself in a Position Different From That of a Private Employer and Contrary to the Principles of Quasi Contract.

Ignoring the fact that the government is a volunteer without rights and that the injured party by operation of law has wholly released and discharged the employee from obligation to anyone, there are further most compelling reasons why the government cannot prevail on the theory it is advancing. Even if the employee's release by judgment alone, as distinguished from satisfaction thereof, did not label the government as a volunteer and even if the initial obligation of the employee had not been so released as to preclude indemnification, still the government's demand must be refused unless we consider it above the law, which is certainly not the case. There are two good reasons why it may not presume to the position of a private employer for the purpose of securing a remedy under quasi contract at common law to which it is not entitled.

In the first place, section 2676 acts to release the claim of the third party against the employee immediately upon the rendition of judgment against the government. It is conceded by appellant that this does not occur in cases involving a private employer at common law until the employer has satisfied the judgment. Therefore, the government by this mechanism has placed itself in a position antithetic to that of a private employer and may not now

aim assimilation solely to obtain a remedy which it has ailed to seek by proper methods.

Secondly, the position of the government at the time udgment is rendered against it is totally different from hat of a private employer under the law at a similar mo- ent. For upon judgment against a private employer here exists a remedy by legal process to compel satisfac- on from the assets of the judgment debtor. Certainly he government does not maintain that it is subject to the ame legal compulsion after judgment as a private em- loyer.

Therefore, by what right does it demand to be placed n the position of a private employer? How clearly it ould violate the quasi-contractual considerations of quity and morality to allow the United States to assert private employer's right to indemnity merely upon ren- ition of judgment against the government. The judg- ent debtor has no legal method of enforcing his judg- ent comparable to that afforded against a private em- loyer, nor has the government made any legal con- ession comparable to that required of a private employer efore bringing suit. One cannot, in good conscience, lay laim to the benefits of another's position under the law, he burdens of which he is unable or unwilling to assume.

Conclusion.

It is respectfully submitted that the position of the etitioner before this court is untenable and the judgment f the court of appeals must be affirmed.

PARKER, STANBURY, REESE & MCGEE,
WM. C. WETHERBEE,
PAUL J. SEDGWICK,
Attorneys for Respondent, Mead Gilman, Jr.

In the

Supreme Court of the United States

October Term, 1953

No. 449

UNITED STATES OF AMERICA,
Petitioner

v.

MEADE GILMAN, JR.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF FRED L. HARRISON FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF ON BEHALF OF FRED L. HARRISON

RICHARD W. GALIHER
636 Woodward Building
Washington, D. C.

RICHARD L. WILLIAMS
ROBERT G. BUTCHER
(Parrish, Butcher and Parrish)
1208 Mutual Building
Richmond 19, Virginia

Counsel for Harrison

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

In the

Supreme Court of the United States

October Term, 1953

No. 449

UNITED STATES OF AMERICA,
Petitioner

v.

MEADE GILMAN, JR.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as attorney for and on behalf of Fred L. Harrison, respectfully moves this Honorable Court for leave to file the accompanying brief as *amicus curiae*.

Fred L. Harrison is the appellant in a case now pending before the United States Court of Appeals for the Fourth Circuit under the style of *Fred L. Harrison* v. *United States of America* (6725) argued January 13, 1954, at Charlotte,

North Carolina, in which the issue before the Court was identical to the issue before the Court in the instant case.

The Court of Appeals for the Fourth Circuit has notified counsel that its decision in Harrison's case will be reserved until the Court decides the instant case.

Because a decision by this Court will be determinative of Harrison's case we deemed it appropriate to make this application for leave to intervene herein as *amicus curiae* and submit the accompanying brief setting forth our views on the question involved in this case.

Counsel for the petitioner and counsel for the respondent have consented to the filing of this brief.

RICHARD W. GALIHER
636 Woodward Building
Washington, D. C.

February 24, 1954

RICHARD L. WILLIAMS
ROBERT G. BUTCHER
1208 Mutual Building
Richmond 19, Virginia

BRIEF ON BEHALF OF FRED L. HARRISON AS AMICUS CURIAE

OPINION BELOW

The opinion of the U. S. District Court for the Southern District of California (R. 26-29) is not reported. The opinions of the Court of Appeals (R. 52-58) are reported at 206 Fed. 2d 846.

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1953. The petition for a writ of *certiorari* was filed on October 30, 1953, and was granted on December 14, 1953 (R. 61). The jurisdiction of this Court rests upon 28 U. S. C. 1254(i).

QUESTION PRESENTED

The single question raised by this appeal is whether the United States has a right to indemnity from an employee whose negligence imposes liability upon it by reason of the Federal Tort Claims Act.

STATUTES INVOLVED

The pertinent sections of the Federal Tort Claims Act, hereinafter referred to as the "Act", provide as follows:

> 28 U. S. C. 1346(b): "Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."
>
> 28 U. S. C. 2672: "The head of each federal agency, or his designee for the purpose, acting on behalf of the

United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

"Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award or determination shall be final and conclusive on all officers of the government, except when procured by means of fraud.

"Any award made pursuant to this section, and any award, compromise, or settlement made by the Attorney General pursuant to Section 2677 of this title, shall be paid by the head of the federal agency concerned out of such agency's appropriations therefor, which appropriations are hereby authorized.

"The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter."

28 U. S. C. 2674: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory

damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

28 U. S. C. 2676: "The judgment in an action under Section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

28 U. S. C. 2680: "The provisions of this chapter and Section 1346(b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

"(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

"(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

"(d) Any claim for which a remedy is provided by Sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

"(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of Sections 1-31 of Title 50, Appendix.

"(f) Any claim for damages caused by the im-

position or establishment of a quarantine by the United States.

"(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

"(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

"(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

"(k) Any claim arising in a foreign country.

"(l) Any claim arising from the activities of the Tennessee Valley Authority.

"(m) Any claim arising from the activities of the Panama Railroad Company."

ARGUMENT

Inasmuch as the question before the Court involves a right which the petitioner is claiming by virtue of the Act we are taking the liberty to set forth certain background information which the Court may find helpful in determining the issue herein.

The Attorney General in 1941, prior to the passage of the Act, in an opinion to the Secretary of Agriculture, disclaimed any right of indemnity in favor of the United States. The full opinion appears in 40 Ops. Aty. Gen. p. 38 (1941), but we will set forth only the last three paragraphs

of the opinion which seem to express the general attitude taken by the Government on any right over it may have against an erring employee following payment for the employee's negligent acts:

"Numerous suits were filed by officers and employees of the Government and the judgments obtained were sometimes in amounts so large as to threaten financial ruin and bankruptcy. Notwithstanding the view stated by the Solicitor in *Dennis* v. *United States*, the Congress repeatedly came to the relief of the erring officers and employees. Thus, in *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 124, the Supreme Court held Captain Murray of the U. S. Frigate Constitution personally liable for a tortious seizure, but the Congress made provision for his relief by the Act of January 31, 1805, see 12 Six Stst. 56. Some of these suits were undoubtedly prosecuted in anticipation of such action by the Congress. In other cases private acts appropriated money for the direct relief of the injured private persons.

"Since that time the Congress has by general legislation progressively assumed liability to persons sustaining injury through negligence of officers and employees of the Government and in doing so has not made provisions for the assertions of claims by the United States against the officers and employees causing the damage. A comprehensive review of the course of such legislation (including private acts) in collision cases appears in the Government's brief on reargument in *Boston Sand & Gravel Company* v. *United States* (No. 15, Oct. Term 1928), 278 U. S. 41.

"For the foregoing reasons it is my opinion that there is no authority in the Secretary of Agriculture to require an employee to reimburse the Government for a payment made in settlement of a claim under the Act of December 28, 1922. Of course, the employee

may be subject to suitable disciplinary action, including dismissal, if warranted."

The Act was passed by the Seventy-ninth Congress in 1946 as Title 4 of the Legislative Reorganization Act, 60 Statute 842. Prior to passage of the Act private bills were frequently introduced in Congress to appropriate funds to pay claims against the United States that arose as a result of tortious acts of employees of the United States and the following statistics taken from the foot notes in *Dalehite* v. *United States*, 346 U. S. 15, 73 Sup. Ct. 956, at pages 24 and 25, show the volume of these bills introduced in previous sessions of Congress:

"'In the Sixty-eighth Congress about 2,200 private claim bills were introduced, of which 250 became law. . . .

"'In the Seventieth Congress 2,268 private claim bills were introduced, asking more than $100,000,000. Of these, 336 were enacted, appropriating about $2,830,000, of which 144, in the amount of $562,000, were for tort.

"'In each of the Seventy-fourth and Seventy-fifth Congresses over 2,300 private claim bills were introduced, seeking more than $100,000,000. In the Seventy-sixth Congress approximately 2,000 bills were introduced, of which 315 were approved, for a total of $826,000.

"'In the Seventy-seventh Congress, of the 1,829 private claim bills introduced and referred to the Claims Committee, 593 were approved for a total of $1,000,253.30. In the Seventy-eighth Congress 1,644 bills were introduced; 549 of these were approved for a total of $1,355,767.12.' HR Rep. No. 1287, 79th Cong., 1st Sess., p. 2."

I.

The United States Did Not Have a Right to Indemnity From Its Employees Prior to Passage of the Act

While it is readily conceded that at common law a right to indemnity exists in favor of an employer who has been required to respond in damages under principles of *respondeat superior*, this right did not extend to the United States. Prior to passage of the Act, the United States had an absolute immunity from claims arising from tortious acts of its employees committed during the course and scope of their employment. The Court in *Prechtl* v. *United States*, 84 Fed. Supp. 889, in commenting on the United States' position prior to the Act said on p. 890:

> "The United States was not liable before enactment of the Tort Act and its very purpose was to assume liability of its employees when acting in their employment by the United States."

Notwithstanding its complete immunity from claims arising from tortious acts of employees prior to the Act, private bills were introduced in Congress to appropriate funds to pay judgments that had been obtained against Federal employees, or to pay claims before they were reduced to judgments. See *infra* page 8. When Congress appropriated money in these instances, its actions were gratuitous, and certainly no claim to indemnity could be made from an employee where the United States voluntarily waived its immunity and assumed an obligation that was personal solely to the employee.

Bearing in mind the fact that the United States had no right to indemnity from its employees prior to passage of the Act, does the Act itself create such a right? A careful

reading of the pertinent provisions of the Act set forth at the beginning of this brief shows conclusively that the Act is silent as to any rights the United States might have against its employees. Sections 1346(b) and 2674, *supra*, state only that the United States shall be liable to the claimant under circumstances where liability would attach if the United States were a private party. And Section 2676 expressly states that if the claimant obtains a judgment against the United States under the Act, it will be a complete bar to any action against the employee. Section 2672 also insulates the employee from liability where the claimant has been paid by administrative award. After reading the language of the Act itself, it takes very strained reasoning to conclude that the United States would give its employees complete protection under Sections 2672 and 2676 from the claimant, and then substitute itself to any and all rights that the claimant had against the employee.

II.

No Right of Indemnity from Employees Was Contemplated By Congress When the Act Was Passed

At this point some attention should be given to the legislative intent that gave rise to the Act. This Honorable Court in *Dalehite* v. *United States*, *supra*, recently considered in detail the various Congressional hearings and reports that took place before the Act was passed and stated the reasons for the Act being passed on page 24 as follows:

> "The Federal Tort Claims Act was passed by the Seventy-ninth Congress in 1946 as Title 4 of the Legislative Reorganization Act, 60 Stat. 842, after nearly thirty years of Congressional consideration. It was the offspring of a feeling that the Government should assume the obligation to pay damage for the mis-

> feasance of employees in carrying out its work. And the private bill device was notoriously clumsy. Some simplified recovery procedure for the mass of claims was imperative. This Act was Congress' solution, affording instead easy and simple access to the Federal Court for torts within its scope."

Certainly this Court could not logically conclude in the *Dalehite* case that the Act was the offspring of a feeling that the United States should assume the obligation to pay damage for the misfeasance of employees in carrying out its work, and now hold that the United States after assuming this obligation on behalf of its employees, could require an erring employee to make it whole for the obligation voluntarily assumed. If this Court should adopt the position now urged by the petitioner herein the Act will be turned into a burden insofar as Federal employees are concerned rather than a benefit. Before the Act was passed the employee could settle any claim that might be made against him, have a jury trial if he so desired, engage counsel of his own choice, know in some instances that suits would not be brought against him because his impecunious status was known, and in cases where an action was tried the award made by the court or jury might well be tempered because the defendant was an individual rather than a party whose ability to respond in damages was not open to question. Now that the Act has been passed all of these considerations are lost insofar as the employee is concerned, unless the claimant proceeds against him directly. And even though the employee is proceeded against directly by the claimant, if judgment is taken against him he can still apply to Congress for legislative relief. For example, Private Law 820, Eighty-second Congress, passed after the Act became effective, afforded such relief to a mail truck operator who had been

held liable to a claimant for negligence while acting within the course and scope of his employment by the United States.

Following this private bill, which was in effect another way of giving the employee the same protection he would have received if the claimant had sued the United States under the Act, could the United States then proceed against the employee for indemnity? Will the respondent in the instant case have a right to apply to Congress for a private bill to appropriate money to pay any judgment the court may enter against him in favor of the petitioner? If legislative relief is still granted to an employee where the claimant does not proceed against the United States under the Act, this same relief ought to be available to the employee if he becomes liable in damages by virtue of the Act. Certainly, the United States' policy toward its employees would be inconsistent if the same relief was not available to the employee, irrespective of how his personal liability arose. If the petitioner's claim is granted in this case, the entire purpose of the Act will be obviated, in that the employee has not been given the protection contemplated and Congress has not been spared the burden of private bills.

In *U. S.* v. *Yellow Cab Co.*, 340 U. S. 539, the Court, on page 350, made the following statement regarding an argument advanced by the United States that if followed, would give recourse to private bills before Congress:

> "However, if the Act is interpreted as now urged by the Government, it would mean that if an injured party recovered judgment against the Government, the Government then could sue its joint tortfeasor for the latter's contributory share of the damages (local substantive law permitting). On the other hand, if the injured party recovered judgment against the private tortfeasor it would mean that (despite local substantive

law favoring contributory liability) that individual could not sue the Government for the latter's contributory share of the same damages. Presumably the claimant would be relegated to a private bill for legislative relief. Such a result should not be read into this Act without a clearer statement of it than appears here."

Irving Gottlieb, Attorney, Tort Claim Section, Department of Justice, discussed the Government's right for indemnity under the Act in an article appearing in 9 Fed. Bar Journal 391, in the following language:

"It should be pointed out that in one of the early and well established fields where indemnity has been historically operative, that is, in the master-servant relationship, the Federal Tort Claims Act in its legislative history contemplates no action by the United States against its delinquent employees, other than disciplinary proceedings. Section 410(b) of the Act provides for a clear assumption of liability on the part of the United States for the delicts of its agents acting within the scope of their authority. Notwithstanding the foregoing, the Statute on its face being silent on the rights of the United States over against its employees and there being no prohibition of the common law right inherent in the master-servant relationship, the possibility of action over by the United States, where the situation is one calling for more than mere disciplinary action still remains."

Mr. Gottlieb reviews the legislative debates made prior to the passage of the Act when private bills were being passed to relieve the employee from liability and concludes that the debates contemplated no right to indemnity in favor of the United States. Mr. Gottlieb also found that these same debates and the reasoning therefor were adopted by Con-

gress when the Act was passed. That is, the Government was content to have the right to take appropriate disciplinary action against its employee and did not undertake to outline Government fiscal policies.

Moreover, meetings of the Inter-departmental Federal Tort Claims Committee were held on May 4, June 22, July 10, August 1, September 5 and 19, and November 26, 1951, at which time a Sub-committee expressly considered the question before the Court and concluded that no action should be taken to seek indemnification from employees who were responsible for imposing liability upon the United States under the Act. It is significant to note that the Committee had representatives present from sixteen major agencies of the Government, including four from the Department of Justice. It should also be borne in mind that these meetings took place almost five years after the Act was passed and occurred at about the same time the United States filed its first third party complaint against an employee seeking indemnity where it was sued under the Act. Certainly, the Department of Justice was derelict in not asserting claims for indemnity from the inception of the Act, if it believed that the Act created any such right. Perhaps a more plausible explanation for this delay in the right to indemnity being asserted is that it was an afterthought by the Department of Justice rather than any right that was intended to be created by Congress when the Act was passed. The history of the debates preceding the Act certainly supports this theory.

This Court in the *Dalehite* case considered many Congressional reports that covered discussions concerning passage of the Act when the bill was considered by Congress and makes it plain that Congress in passing the Act in 1946 relied upon the Congressional Committee Reports of 1942, including testimony before the committees that was incor-

porated into the reports. Assistant Attorney General Shea testified in detail before a Congressional Committee of the Seventy-seventh Congress, and in discussing Section 2672 of Title 28, which is the corresponding administrative equivalent of Section 2676, for cases that involve less than $1,000 and can be settled by administrative action, said:

> "It is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone, within limits, leaving the employee at fault to be dealt with under the usual disciplinary controls."

Assistant Attorney General Shea testified further in regards to this Section:

> "If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by a judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck. The Chairman: Mr. Shea you are discussing and directing your remarks to the matter where, if a person is injured and files a claim against the Government and the Government satisfies that claim, that is the end of the claim against anybody? Mr. Shea: That is right. The Chairman: What is the arrangement when the Government has an employee who is guilty of gross negligence and injury results? Is there any requirement that that employee should in any way respond to the Government if it has to pay for the injury in the event of gross negligence? Mr. Shea: Not if he is a Government employee. Under those circumstances the remedy is to fire the employee. Mr. McLaughlin: No right of subrogation is set up? Mr. Shea: Not against the employee." (Hearings before the committee

on the Judiciary House of Representatives, 77th Congress, 2nd Session, on H. R. 5373 and 6463, pp. 9 and 10).

III.

The Federal Tort Claims Act Imposes Liability Upon Employees in Those Instances Where Congress Did Not Insulate the Employees from Liability.

A reading of the Act shows that employees are divided into two classes thereunder. Those guilty of simple negligence are relieved from all liability under Sections 1346(b), 2672, 2674 and 2676. However, those employees who are guilty of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, fall into a separate class and are expressly denied the benefit of the Act by Section 2680(h). This Section unequivocally states that the United States will not be liable for its employees' tortious conduct under enumerated circumstances. If Congress had not intended to relieve employees from liability in all other instances, it would have so stated in the Act. It is difficult to understand why Congress would go to the trouble of enumerating instances in which a Federal employee would be responsible for his misconduct committed while acting on behalf of the United States if it intended for all employees regardless of any wrongful act they may have committed to fall in the same class. The only logical explanation for Section 2680(h) is that Congress planned to completely assume all liability insofar as Federal employees were concerned except in those instances where they were guilty of a wrongful act that approached being willful, namely those acts which were set forth in Section 2680(h).

IV.

Even if the United States Had a Right to Indemnity from Its Employees Prior to Passage of the Act Section 2676 Thereof Would Bar This Right.

Assuming for the purpose of argument that the United States had a right to indemnity prior to passage of the Act Section 2676 would bar this right.

In the instant case the Court of Appeals for the Ninth Circuit in reversing the District Court and entering final judgment in favor of the respondent said on page 848:

> "When we inquire whether a rule dependent upon this rationale should apply in the instant case, we are at once confronted by the circumstance that the moment judgment was entered against the Government, then by virtue of Section 2676, *supra*, the employee was no longer primarily answerable to the claimant,—he was not answerable at all. Therefore, when or if the Government paid the judgment against it, it was not paying a sum which the employee ought to have paid, for, as we have seen, any obligation on his part was completely wiped out.
>
> "It is therefore our conclusion that since any legal basis for a claim of indemnity is here lacking, the Government was not entitled to have judgment against the appellant. It is thus apparent that we do not deal with any question as to whether Section 2676 releases the Government's claim against its employee. Such is not the question here, but rather the inquiry is, whether, in the circumstances of this case any cause of action ever arose in favor of the Government and against its employee. Since the right of indemnity here asserted arises, in the case of employers generally, only by quasi-contract, through the payment of that which the employee himself, in equity and good conscience should have paid, it is manifest that here, where the employee owes no such duty, the circumstances of the necessary unjust enrichment do not exist, and no cause of action ever arose in favor of the Government.

"While the legislative history of the Tort Claims Act is in no sense controlling in an attempt to arrive at intended consequences of Section 2676, yet its indications are not at variance with the results here arrived at.

"We think it is clear from what was said in *United States* v. *Standard Oil Co.*, 332 U. S. 301, 305, 67 S. Ct. 1604, 91 L. Ed. 2067, that the question of the duty owed by a Government employee to the Government is one to be determined by federal and not by state law. The cause of action which the Government here sought to enforce was not one under the Federal Tort Claims Act which adopts local law for the purpose of defining the Government's tort liability. But regardless of whether state or federal law be here applied, Section 2676 cuts the ground from under the Government's claim for indemnity.

"It is to be noted that in using the language quoted *supra* from *United States* v. *Yellow Cab Co.* the Supreme Court was not dealing with a situation involving any possible application of Section 2676. The court was considering the question of contribution as between the United States and a stranger tortfeasor".

The petitioner is urging the Court to put it on the same basis as any other employer insofar as indemnity is concerned and stresses at length that Congress intended this result when the Act was passed. In support of its argument cases are cited wherein the United States has been given a right to contribution from a tortfeasor when sued under the Act and has been allowed indemnity from a third party tortfeasor. *United States* v. *Yellow Cab Company*, 340 U. S. 543; *United States* v. *Savage Truck Lines*, No. 6648-6651, decided December 21, 1953 (C. A. 4). The petitioner further claims that these were rights not specifically given by the Act and therefore its claim to indemnity is a matter for the courts to recognize and not something that should have been given when the Act was passed. This argument loses its force completely when attention is directed to the

intention of Congress when the Act was passed. This Court has held that one of the purposes of the Act was for the United States to assume its employees' liability for torts committed in carrying out governmental functions, *Dalehite* v. *United States*, *supra*. There, of course, was no intention on the part of Congress when it passed the Act to relieve persons that were strangers to the Federal system from liability, as a contrary holding in the *Yellow Cab* and *Savage Truck Lines* cases would have accomplished. In fact, strangers to the Federal system are benefitted to an extent by the Act since they can also claim contribution from the United States and indemnity in a proper case.

V.

In the Final Analysis the Question of Whether the United States Should Have Indemnity from Its Employees Under the Act Is One Involving Federal Fiscal Policy and Should Be Determined by Congress.

In *United States* v. *Standard Oil Co.*, 332 U. S. 201, the United States sought to recover from Standard Oil Company losses it had suffered as the result of injuries inflicted upon a soldier in an automobile accident with one of Standard Oil Company's trucks. It was undisputed that following the accident the United States had been required to provide medical care to its injured soldier as well as pay his salary during the time that he was confined to the hospital for treatment. The United States based its claim against Standard Oil Company upon numerous common law analogies such as a master's right to sue for loss of a servant's time, a father's right to sue for the loss of services of a minor child and various workmen's compensation statutes where the compensation insurance carrier or the employer become subrogated to any rights that the injured employee may have had against a third party to the extent

that they had been made to pay. The court in rejecting the Government's arguments and holding in favor of Standard Oil Company stated that whether or not the United States was entitled to recoup from a third party in such instances was a matter for the legislature in the following language:

> "Moreover, as the Government recognizes for one phase of the argument but ignores for the other, we have not here simply a question of creating a new liability in the nature of a tort. For grounded though the argument is in analogies drawn from that field, the issue comes down in final consequence to a question of Federal fiscal policy, coupled with considerations concerning the need for and the appropriateness of means to be used in executing the policy sought to be established. The tort law analogy is brought forth, indeed, not to secure a new step forward in expanding the recognized area for applying settled principles of that law as such, or for creating new ones. It is advanced rather as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities.
>
> "Whatever the merits of the policy, its conversion into law is a proper subject for Congressional action, not for any creative power of ours. Congress, not this court, or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often exclusive arbitor of federal fiscal affairs. And these comprehend, as we have said, securing the treasurer of the Government against financial losses however inflicted, including requiring reimbursement for the injuries creating them, as well as filling the treasury itself.
>
> "Moreover, Congress without doubt has been conscious throughout most of its history that the Government constantly sustains losses through the tortious or even criminal conduct of persons interfering with Federal funds, property and relationships. We cannot as-

sume that it has been ignorant that losses long have arisen from injuries inflicted on soldiers such as occurred here. The case therefore is not one in which as the Government argues, or that is involved is application of 'a well settled concept of legal liability to a new situation, where that new situation is in every respect similar to the old situation that originally gave rise to the concept.' "

In this connection it is interesting to note that under the Federal Workmen's Compensation Act, U. S. C. A., Title 5, Section 776, the United States is subrogated to any rights its employees may have against responsible third parties to the extent that it has been made to pay. It seems reasonable to assume that Congress in passing the Act would have made some provision to recoup the United States' losses following payment on behalf of an erring employee if it had not intended to assume the employee's liability and be solely responsible therefor. As the Court pointed out in the *Standard Oil Company* case, Congress has not been unmindful of these situations where Federal funds are being lost, but has purposely abstained from taking any action to recoup the loss.

While the petitioner attempts to distinguish its claim for indemnity in the instant case from the United States' claim against Standard Oil Company which was denied by this Court on the basis that Congress was not aware of any losses that the United States was suffering as a result of its employees' negligent acts, the statistics taken from the *Dalehite* case that appear on page 8 of our brief refute this contention. Moreover, the testimony of Mr. Shea, that we have set forth on page 15 of our brief shows that Congress through its committee was expressly advised that the United States would bear losses of this type alone, without any recourse being taken against its employees. After being so advised Congress did not deem it appropriate to incor-

porate a provision into the Act that would permit a recoupment of the United States' losses under the Act. If there has been a change of policy insofar as the petitioner's losses under the Act are concerned it is respectfully suggested that Congress would be the appropriate body to enact legislation that would permit the petitioner to recover these losses.

CONCLUSION

It is respectfully submitted that the petitioner is not entitled to indemity from its employees under the Act and that no such right was contemplated by Congress when the Act was passed. Moreover, if indemnity is granted to the petitioner herein the purposes of the Act will have been obviated in that the employee has not been protected as was contemplated, and Congress has not been spared from a flood of private bills seeking appropriations to pay claims against governmental employees. If the Court grants indemnity to the petitioner herein it will be transgressing into a matter that solely involves Federal fiscal policy and it is respectfully submitted that whether or not the United States recoups its losses in these cases is a matter that should receive the attention of Congress alone.

Respectfully submitted,

RICHARD W. GALIHER
636 Woodward Building
Washington, D. C.

RICHARD L. WILLIAMS
ROBERT G. BUTCHER
(Parrish, Butcher and Parrish)
1208 Mutual Building
Richmond 19, Virginia

Counsel for Harrison

SUPREME COURT OF THE UNITED STATES

No. 449.—October Term, 1953.

United States of America, Petitioner, *v.* Mead Gilman, Jr.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 17, 1954.]

Mr. Justice Douglas delivered the opinion of the Court.

The single question in the case is whether the United States may recover indemnity from one of its employees after it has been held liable under the Federal Tort Claims Act,[1] 60 Stat. 842, 28 U. S. C. §§ 1346, 2671 *et seq.*, for the negligence of the employee.

[1] The Act provides in pertinent part as follows:

Sec. 1346. (b) "Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Sec. 2674. "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. . . ."

Sec. 2676. "The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

Respondent, an employee of the United States, had a collision with the car of one Darnell, while respondent was driving a government automobile. Darnell sued the United States under the Tort Claims Act. The United States filed a third-party complaint against respondent, asking that if it should be held liable to Darnell, it have indemnity from respondent. The District Court found that Darnell's injuries were caused solely by the negligence of respondent, acting within the scope of his employment. It entered judgment against the United States for $5,500 and judgment over for the United States in the same amount. The Court of Appeals reversed the judgment against respondent by a divided vote. 206 F. 2d 846. The case is here on writ of certiorari. 346 U. S. 914.

Petitioner's argument is that the right of indemnity, though not expressly granted by the Tort Claims Act, is to be implied. A private employer, it is said, has a common-law right of indemnity against an employee whose negligence has made the employer liable. The Tort Claims Act, by imposing liability on the United States for the negligent acts of its employees, has placed it in the general position of a private employer. Therefore, it should have the comparable right of indemnity against the negligent employee which private employers have. *United States* v. *Yellow Cab Co.*, 340 U. S. 543, is said to show the way. For there we held that the United States could be sued as a third-party defendant for contributions claimed by a joint tort-feasor, though no specific provision of the Tort Claims Act provided for such suits.

In that case, however, we were dealing with an established type of liability, which was within the broad sweep of the claims for which the United States had agreed to stand liable. Since the claim was within the class covered by the waiver of sovereign immunity, the Court refused to restrict its enforcement to separate actions for contribution.

The present case is quite different. We deal not with the liability of the United States, but with the liability of its employees. The Tort Claims Act does not touch the liability of the employees except in one respect: by 28 U. S. C. § 2676 it makes the judgment against the United States "a complete bar" to any action by the claimant against the employee. And see § 2672.

The relations between the United States and its employees have presented a myriad of problems with which the Congress over the years has dealt. Tenure, retirement, discharge, veterans' preferences, the responsibility of the United States to some employees for negligent acts of other employees—these are a few of the aspects of the problem on which Congress has legislated. Government employment gives rise to policy questions of great import, both to the employees and to the Executive and Legislative Branches. On the employee side are questions of considerable import. Discipline of the employee, the exactions which may be made of him, the merits or demerits he may suffer, the rate of his promotion are of great consequence to those who make government service their career. The right of the employer to sue the employee is a form of discipline. Perhaps the suits which would be instituted under the rule which petitioner asks, would mostly be brought only when the employee carried insurance. But the decision we could fashion could have no such limitations, since we deal only with a rule of indemnity which is utterly independent of any underwriting of the liability. Moreover, the suits that would be brought would haul the employee to court and require him to find a lawyer, to face his employer's charge, and to submit to the ordeal of a trial. The time out for the trial and its preparation, plus the out-of-pocket expenses, might well impose on the employee a heavier financial burden than the loss of his seniority or a demotion in rank. When the United States sues an employee

and takes him to court, it lays the heavy hand of discipline on him, as onerous to the employee perhaps as any measure the employer might take, except discharge itself.

On the government side are questions of employee morale and fiscal policy. We have no way of knowing what the impact of the rule of indemnity we are asked to create might be. But we do know the question has serious aspects—considerations that pertain to the financial ability of employees, to their efficiency, to their morale. These are all important to the Executive Branch. The financial burden placed on the United States by the Tort Claims Act also raises important questions of fiscal policy. A part of that fiscal problem is the question of reimbursement of the United States for the losses it suffers as a result of the waiver of its sovereign immunity. Perhaps the losses suffered are so great that government employees should be required to carry part of the burden. Perhaps the cost in the morale and efficiency of employees would be too high a price to pay for the rule of indemnity the petitioner now asks us to write into the Tort Claims Act.

We had an analogous problem before us in *United States* v. *Standard Oil Co.*, 332 U. S. 301, where the United States sued the owner and driver of a truck for the negligent injury of a soldier in the Army of the United States, claiming damages for loss of the soldier's service during the period of his disability. We were asked to extend the common-law action of *per quod servitium amisit* to the government-soldier relation. We declined, stating that the problem involved federal fiscal affairs over which Congress, not the Court, should formulate the policy.

The reasons for following that course in the present case are even more compelling. Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has

not taken a position. It presents questions of policy on which Congress has not spoken.[2] The selection of that policy, which is most advantageous to the whole, involves

[2] Though the legislative history of the Act is not too helpful on this issue, such indications as there are point toward the result we reach. The Court recently made an extensive review of the history of the Tort Claims Act in *Dalehite* v. *United States*, 346 U. S. 15, 24–30. As there explained, much of its relevant history appears in the Seventy-seventh Congress, rather than in the Seventy-ninth Congress, which enacted it. In the Seventy-seventh Congress the bill took substantially the form in which it was finally enacted by the Seventy-ninth Congress.

At the hearings before the House Judiciary Committee of the Seventy-seventh Congress, the question of the liability of government employees arose. Mr. Francis M. Shea, then Assistant Attorney General, explained the Government's position. In discussing the provision for administrative settlement of small claims (which is now 28 U. S. C. § 2672), Mr. Shea was questioned concerning the clause under which acceptance of an award by the claimant constitutes a release of all claims against the employee, as well as against the United States. The present § 2672 has much the same effect as § 2676, which makes a judgment against the United States a bar to action against the employee. See note 1, *supra*. Mr. Shea's statements concerning the administrative settlement provision therefore have some relevance to the issue in the present case.

"Mr. SPRINGER. I would like to direct your attention, Mr. Shea, to line 19. Why do you provide this acceptance of the award as constituting a bar to the claim against the employee? Is that the intention of the provision, and what is the ultimate purpose of it?

"Mr. SHEA. . . . It has been found that the Government, through the Department of Justice, is constantly being called on by the heads of the various agencies to go in and defend, we will say, a person who is driving a mail truck when suit is brought against him for damages or injuries caused while he was operating the truck within the scope of his duties. Allegations of negligence are usually made. It has been found, over long years of experience, that unless the Government is willing to go in and defend such persons the consequence is a very real attack upon the morale of the services. Most of these persons are not in a position to stand or defend large damage suits, and they are of course not generally in a position to secure the kind of insurance which one would if one were driving for himself.

"If the Government has satisfied a claim which is made on account

a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.

Affirmed.

---

of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by a judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck. If he could sue the driver of the truck, we would have to go in and defend the driver in the suit brought against him, and there will thus be continued a very substantial burden which the Government has had to bear in conducting the defense of post-office drivers and other Government employees.

"Mr. McLaughlin. Have you considered the practice followed by large corporations and railway companies with respect to defense of employees who are joined as defendants in negligence actions?

"Mr. Shea. I should think that what ordinarily happens in the case of an accident caused by a driver for a big corporation is that suit is brought jointly against the two, and usually it is satisfied by the corporation, and then ordinarily the corporation's remedy against the driver is to fire him if he is negligent too often. Ordinarily the corporations cover such risks by insurance, which is paid for by the employer, I think.

"The Chairman. Mr. Shea, you are discussing and directing your remarks to the matter where, if a person is injured and files a claim against the Government and the Government satisfies that claim, that is the end of the claim against anybody?

"Mr. Shea. That is right.

"The Chairman. What is the arrangement when the Government has an employee who is guilty of gross negligence and injury results? Is there any requirement that that employee should in any way respond to the Government if it has to pay for the injury, in the event of gross negligence?

"Mr. Shea. Not if he is a Government employee. Under those circumstances, the remedy is to fire the employee.

"Mr. McLaughlin. No right of subrogation is set up?

"Mr. Shea. Not against the employee."

See Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess., pp. 9–10. See also S. Rep. No. 1196, 77th Cong., 2d Sess., p. 5.